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# The creation of the New Hampshire State Prison for Women: Some unintended consequences of legal reform

Elaine Rizzo

*University of New Hampshire, Durham*

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Some unintended consequences of legal reform**

**Rizzo, Elaine, Ph.D.**

**University of New Hampshire, 1994**

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**THE CREATION OF THE NEW HAMPSHIRE STATE PRISON FOR WOMEN:  
SOME UNINTENDED CONSEQUENCES OF LEGAL REFORM**

**BY**

**ELAINE RIZZO**

**B.A., University of Massachusetts, Boston, 1972  
M.A., Boston College, 1973**

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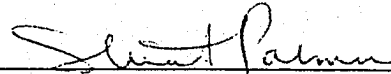
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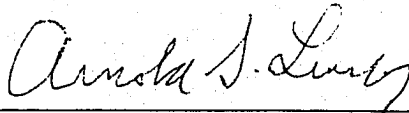
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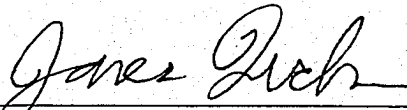
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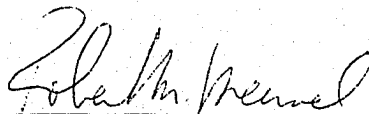
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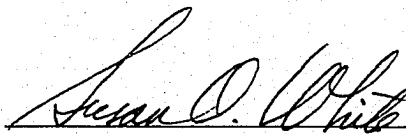
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## ABSTRACT

### THE CREATION OF THE NEW HAMPSHIRE STATE PRISON FOR WOMEN: SOME UNINTENDED CONSEQUENCES OF LEGAL REFORM

by

Elaine Rizzo

University of New Hampshire, December, 1994

In 1989, New Hampshire established its first women's prison in response to a lawsuit filed by inmates charging the state with sex discrimination in its treatment of women prisoners. This litigation reflects a growing use of legal reform based on equal protection rights by female inmates to express and remediate correctional needs.

The purpose of this dissertation is to examine the conditions that led to the creation of the women's prison, and the unintended consequences that have resulted from legal reform on the correctional treatment and court processing of female offenders.

This research uses qualitative and quantitative methods. Qualitative analysis examined archival documents on corrections in New Hampshire, court orders, and other legal documents relating to the creation of the prison. A quantitative analysis of all female felony cases referred to the Hillsborough County Superior Court for prosecution between January 1, 1986 and May 31, 1993 sought to determine whether court referrals, prosecution, incarceration, and length of sentence increased following the opening of the women's prison.

An increase in referral, prosecution, and incarceration of female felony offenders during the postprison period was found. Conversely, case dismissals, rejections, and the use of suspended sentences decreased. It is concluded that the use of legal reform based

on demands for parity of treatment has only provided women prisoners with partial relief in identifying and meeting their correctional needs. Most female inmates still perceive the quantity and quality of prison programs available to them as unsatisfactory.

Legal reform was used to present a correctional problem. The creation of a prison was the offered solution. For the inmates, correctional problems still exist, and the creation of the prison has introduced an additional problem--the expansion of the institutional model to more broadly encompass female offenders.

## INTRODUCTION

In November of 1989, New Hampshire established its first woman's prison. Unlike most prison development, the creation of the New Hampshire State Prison for Women did not occur as a result of the efforts of criminal justice or correctional personnel, or through an executive or legislative task force empowered to study the need for such a facility, or even through the advocacy of reformists, or the crime control demands of citizens' groups. This prison was established through a federal court order resulting from a civil class action suit filed by seven female inmates under state prison sentence demanding the right to their own prison.

Since it has only recently established its first women's prison, and since this prison came into existence through litigation demanding parity with male prisoners, New Hampshire provides a unique opportunity to study the creation of a women's prison and the practical application of a parity standard in addressing the correctional needs of female inmates. In addition to examining these issues, this dissertation seeks to contribute to the need for research that explores the implications and unintended consequences of correctional reform based on a doctrine of legal equality for female offenders.

Feminist legal scholars have raised a number of questions surrounding the capability of the law to serve as a catalyst and vehicle for meaningful social change and for achieving substantive gender equality. Furthermore, there is considerable debate in the literature over which legal arguments would have to be framed for the law to function in this capacity. It is not the intent nor the purpose of this study to pursue the type of legal

discourse that would be necessary to fully examine these issues. This debate is raised only to highlight the dilemma posed by a feminist legal critique that recognizes that "formal legal equality of women with respect to men cannot provide substantive equality" (Daly, 1990:11).

It is this dilemma that confronted the female inmates who filed the lawsuit demanding a separate women's prison--demanding parity with male inmates. It is this very dilemma that women inmates in New Hampshire continue to face now that their demands have been met and a prison for women exists.

#### Crime and Incarceration Rates in New Hampshire

The first separate prison for women was created in Indiana in 1874 (Freedman, 1992:46). Until the New Hampshire State Prison for Women opened, only New Hampshire and West Virginia had remained without any institutional facility for female felony offenders (Pollock-Byrne, 1990:85). That New Hampshire had not felt the need to establish a prison for women is not as unusual as it may seem at first observation. As a small, rural state with a relatively stable and homogenous population, crime did not pose as serious a problem or as great a threat as it did in much of the rest of the nation.

As can be seen in Table 1, as recently as 1982, New Hampshire had the lowest violent crime rate (125) and the second lowest nonviolent crime rate (3,704) in New England. Its overall crime rate of 3,829 was lower than any other New England state and far lower than that of New England as a region (5,155) and the country as a whole (5,553).

Table 1. Felony Crime Rates (per 100,000 resident population), Violent, Non-Violent, and Total, for New Hampshire, Other New England States and the United States, 1982 and 1989

Jurisdiction	<u>1982</u>			<u>1989</u>		
	Total	Violent	Nonviolent	Total	Violent	Nonviolent
New Hampshire	3,829	125	3,704	3,597	169	3,428
Maine	3,860	163	3,697	3,583	137	3,446
Vermont	4,692	127	4,565	4,089	133	3,956
Rhode Island	5,364	402	4,962	5,225	378	4,847
Connecticut	5,428	400	5,028	5,270	512	4,758
Massachusetts	5,503	571	4,932	5,136	675	4,461
New England	5,155	425	4,730	4,846	491	4,355
United States	5,553	555	4,998	5,741	663	5,078

Source: Adapted from State of New Hampshire Prison Expansion, Performance Audit Report, April, 1992:18

In 1989, the year the women's prison opened, New Hampshire's overall crime rate (3,597) had decreased and was the second lowest in New England. Similarly, as Table 2 reveals, New Hampshire's incarceration rate during this period was the lowest in New England. In fact, in 1989, despite a 119% increase in prison population, New Hampshire's incarceration rate was still the third lowest in the United States, ranking 47th out of 50 states (Sourcebook, 1992:609).

The number of female prisoners was also extremely small. At the end of 1988, 11 months before the women's prison opened, there were only 24 women under state sentence in New Hampshire (Correctional Populations in the United States, 1989, 1991:66).

Table 2. Rate (per 100,000 resident population) of Sentenced Prisoners in State and Federal Institutions on December 31 for New Hampshire, Other New England States, and the United States, 1982 and 1989

<u>Jurisdiction</u>	<u>1982</u>	<u>1989</u>	<u>% Change</u>
New Hampshire	47	103	119.1
Maine	69	116	68.1
Massachusetts	77	122	58.4
Rhode Island	82	146	78.0
Vermont	84	109	29.8
Connecticut	114	194	70.2
New England	79	132	67.0
United States	170	271	59.4

Source: Sourcebook of Criminal Justice Statistics, 1992:609

### Incarcerated Women in New Hampshire

Unlike most other states, New Hampshire never participated in the reformatory movement of the nineteenth century that sought to remove female inmates from institutions built to confine men by creating institutions exclusively intended to confine women. Female misdemeanor offenders who were sentenced to incarceration were housed in separate sections of the county houses of correction. The few felony offenders sentenced to incarceration were confined in the men's prison located in Concord under separate, make-shift conditions.

In 1941, a statute was enacted authorizing the transfer of women inmates to other states or to county houses of correction (RSA 622:33 (1941)). Even before this, however, some female inmates had been transferred to institutions in other states. In the late 1920's, some women were sent to Vermont. When its prison was decentralized in the mid-1960's, and it could no longer accept New Hampshire inmates, the women were sent



to Framingham, Massachusetts. Following a riot there in the late 1960's, New Hampshire women were sent to Maine. In the late 1970's, Maine decentralized its prison, and New Hampshire's female felony inmates were sent to Connecticut (New Hampshire State Prison Facility Study, 1976:viii-14). From 1974 until the opening of the New Hampshire State Prison for Women in 1989, all female felony inmates were either being housed in separate sections of the county houses of correction or sent to other states. These states could be as close as Rhode Island or as distant as Colorado.

In 1983, partly in response to the hardships posed by confinement in correctional facilities designed and operated to meet the needs of male inmates, and partly in response to the hardships posed by being transferred to women's facilities out of state, the women prisoners sued the state for gender discrimination. Three-and-a-half years later, on January 13, 1987, following a seven-day trial in the case of Fiandaca v. Cunningham (Memorandum Order, C83-400-L (1987)), The United States District Court for the District of New Hampshire found that: "[F]emale state prisoners experience conditions of confinement different than and inferior to that for male inmates at the New Hampshire State Prison for reasons based solely on their gender."

The New Hampshire State Prison for Women was established in response to this court finding. Although inmates may still be transferred out of state for treatment or security purposes, most female felony offenders are now confined at the New Hampshire State Prison for Women located in Goffstown. The prison building is the former Hillsborough County House of Correction. In order to obtain this facility and convert it to a women's prison, it was agreed that the prison would also serve as a house of correction

for Hillsborough County. Therefore, the women's prison also houses some female misdemeanor offenders.

### Litigation as a Vehicle for Correctional Reform

Historically, the American judiciary maintained a policy of non-intervention regarding cases that challenged the internal administration and operations of prisons. This "hands-off" policy reflected an acceptance by offenders, correctional officials, the judiciary, and society in general, of the belief that inmates lost all constitutional rights upon confinement. Caselaw dating back to 1871 established the principle that inmates forfeited their civil rights upon commitment, in essence being "...the slave of the state" (Ruffin v. Commonwealth 62 VA. 790 (1871)). Additionally, in cases like Sutton v. Settle (302 F2d. 286 (8th Cir. (1962)) the belief was established that correctional policy was more appropriately a responsibility of the legislative and executive branches of government, and that court intervention would be detrimental to both the internal discipline and security of correctional institutions (Alpert, 1976:656-657).

In response to the growing civil rights movement of the 1960's (Alpert, 1976:653-655), and also as a result of a broader constellation of changes in social consciousness regarding the application of democratic principles in Post World War II America, civil liberty protections were increasingly being demanded and recognized for different segments of society, including prisoners (Clear and Cole, 1994:375). In 1964, in the case of Cooper v. Pate (378 U.S. 546 (1964)), a federal court ruling recognized the right of inmates, under Title 42 of the United States Code, section 1983, to seek civil damages

against any state official that acted to deny an inmate's constitutional rights.<sup>1</sup> The legal recognition of prisoners as citizens whose constitutionally protected rights are maintained even upon incarceration allowed inmates access to litigation in the federal courts. This opened the door for judicial intervention in the administration of prisons and for legally mandated reform of conditions of confinement in all correctional facilities, both state and federal.

Following the end of the "hands-off doctrine," inmate litigation in federal courts alone increased from 218 cases in 1966 to 20,346 cases in 1987 (Clear and Cole, 1994:376). Thus, the use of litigation to achieve correctional reform is no longer unusual. Although women have turned to the courts less often than men, the number of civil suits filed by females is also increasing (Gibson, 1973:227; Leonard, 1983:45). While some of the earlier cases brought by inmates challenged extreme situations of deprivation, cruelty, and inhumanity, cases gradually began to address routine administrative policies and procedures. However, the use of litigation by inmates to create a prison when none was already in existence appears to be unprecedented.

#### Legal Theories Available to Female Inmates

A number of explanations have been advanced to explain the disparity in the use of litigation between male and female inmates. These explanations range from gender differences in coping with the prison experience to limited access to legal assistance in

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<sup>1</sup>Prior to this case, inmates had limited access to the courts through tort actions in state courts or through habeas corpus petitions maintaining illegal detention due to procedural errors in the trial. Use of section 1983 has streamlined the process and is the more commonly used mechanism for litigation (McAninch and Wedlock, 1972).

women's institutions (Fabian, 1980:175-176; Lown and Snow, 1980:200-201; Alpert, 1982:38). Once the decision to redress correctional problems through litigation is made, the success of such litigation will often hinge upon the legal theory upon which it is based (Alpert, 1982:39). Prisoners can challenge conditions of confinement and correctional policies and procedures by asserting their constitutional rights under the First, Fourth, Sixth, and Eighth Amendments.<sup>2</sup> Theoretically, litigation invoking constitutional rights is equally available to all inmates. However, most litigation filed by female inmates is based less upon section 1983 of the Civil Rights Act of 1871 and Eighth Amendment protections from cruel and unusual punishment than that of male inmates. Instead, female inmates are more likely to use the Equal Protection Clause and requests for parity of treatment with male prisoners (Alpert, 1982:40). Parity has been weakly defined by the courts not as equal treatment but as "substantially equivalent" treatment (Glover v. Johnson, 510 F.Supp. 1019 (1981)). As such, a number of scholars have expressed concern over whether the parity standard provides full or partial relief to female inmates who use the courts as a vehicle for correctional reform (Alpert, 1982: 40-41; Herbert, 1985:1195-1197).

This use of legal reform raises some important questions surrounding the role of

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<sup>2</sup>Alpert (1982:39) has explained the ways in which these amendments have been in prison litigations:

First Amendment cases include freedom of communication, access to the courts, right to receive and read materials, religion, freedom of expression, visitation, associations, dress, and hygiene. Fourth Amendment issues deal with search and seizure. Fifth Amendment claims include due process, discipline, classification, and parole. The Sixth Amendment defines the right to counsel, and Eighth Amendment cases involve cruel and unusual punishment.

law in remediating problems stemming from institutionalized gender inequality.

Theoreticians have examined the relationship between antidiscrimination law and criminal justice policies, particularly as such legal theory has been applied to conditions of correctional confinement (Fabian, 1979; Lown and Snow, 1980; Bershad, 1985; Herbert, 1985; Daly, 1990). Some scholars believe that any legal argument that does not demand full equality will perpetuate protectionism and gender inequity (Herbert, 1985). However, others (Fabian, 1980; Rafter, 1985:185) question whether legal reform based on equal protection demands will result in a lowering rather than raising of correctional standards for all inmates, and whether increased litigation will actually benefit female inmates. Fabian (1980:185) has noted that the use of legal arguments based on demands for equal rights, while opening legal avenues for penal reform, can prove to be a "double-edged sword" in terms of actually improving the conditions being challenged.

Similarly, Daly (1990:8-14) has expressed concern that an "ideology of equality" would worsen the conditions and circumstances it intends to ameliorate and may lead to an increased confinement of women, particularly women of color. She questions whether the law, since it is created out of the male perspective and experience, is capable of responding to the female voice and perspective. Articulating views expressed in feminist legal studies literature, she raises the troubling question of whether a system of laws, being rooted in a male dominated power hierarchy and that has historically oppressed women, can significantly address demands for social justice and gender equality. In strong language, she cautions that the use of what she terms an "equality ethos" may not produce the intended results because: "Feminist empirical work can easily become twisted and

distorted in legal settings; separate spheres ideology can still be used against women; and the 'equality versus difference' debate is a false opposition...the law's very way of framing discrimination is too static and decontextualized" (Daly, 1990:14).

As a result of this uncertainty, Daly calls for further research in the efficacy of legal reform as a means of meeting the needs of incarcerated women and a closer examination of the specific ways in which an "equality ethos" affects the situation of those women on whose behalf it is being applied. She observes (1990:19): "More prisons are being built today in the name of equality." Furthermore, these prisons are being built at the expense of developing non-institutionalized alternatives that may better serve the needs of offenders and of society.

Daly is not alone in expressing these concerns. Scholars and advocates alike have begun to question whether the increased use of litigation by female inmates to remediate correctional problems will merely serve to build better prisons rather than provide meaningful correctional treatment for all offenders. They call for an approach that goes beyond the demand for parity. In so doing, they seek to challenge the overreliance on incarceration that has characterized contemporary crime control policies, and urge the increased use of a community-based treatment approach. When incarceration must be used, they advocate the adoption of standards that are fair and humane and the development of a correctional model that is capable of providing equal treatment while acknowledging appropriate gender differences in the correctional needs of inmates (Gibson, 1973:228-233; Fabian, 1979:60; Rafter, 1992a:202-207; 1992b:19).

### The Need for Research on Women's Prisons and The Purpose of This Dissertation

Despite the existence of a new, separate prison for women, very little is known about female inmates in New Hampshire. Existing state documents do not even record their numbers with consistency much less their crimes or their personal histories.

An automated, integrated information management system does not yet exist at the Department of Corrections. The difficulty of researching inmate records in New Hampshire, particularly for women, was noted by the Office of Legislative Budget Assistant Performance Audit Report. This report (State of New Hampshire Prison Expansion Performance Audit Report, 1992:112-113) states :

We made several requests for basic offender information. We requested inmate/patient counts by month over a period of time for the men's prison, the secure psychiatric unit, and the women's prison. The data we received was in three entirely different formats and, in the case of the women's prison and secure psychiatric unit, was of questionable value...The women's prison searched monthly files to give us a count for the past year and a half of female inmates admitted and released. No total count was given for each month and when we tried to reconcile the number of female inmates based on the ending count, we could not.

While inaccessible public records may make New Hampshire a particularly difficult state in which to conduct research on incarcerated women, it does not make this state unique. The body of literature on women in prison has been and continues to be very limited and narrow in scope. Due to the low crime and incarceration rates of women, the vast body of correctional literature that exists is disproportionately devoted to the study of institutions and community-based programs created and designed for men.

Early research on incarcerated women sought to fill the void that existed on this topic by focusing on identifying the characteristics of female inmates, the institutional

conditions of their confinement, the problems and behavioral adaptations associated with these conditions, and the inadequacy of institutional and community programs in meeting their needs (Ward & Kassenbaum, 1965; Giallombardo, 1966; Burkhardt, 1976).

As the arrest rate for women continues to rise nationally, so does the incarceration rate. The rate of increase in incarceration of females has exceeded that for males for every year between 1980 and 1989, growing 202% for women in comparison to 112% for men during this period. At the end of 1989, 5.7% of the prison population was female. While this remains a very low proportion, it represents the highest percentage of women incarcerated since annual data began to be collected in 1926. Between 1980 and 1989, the incarceration rate for females increased by 158% in relation to their representation in the general population while the comparable rate of increase for men was 91% (Greenfield and Minor Harper: 1991:1-7). Similarly, New Hampshire is experiencing rising arrest and incarceration rates for women.

The need for increased research on women in prison is apparent. While the creation of the penitentiary for male offenders has been chronicled in great detail in the literature, relatively little is known about the historical development of the women's prison. Recently, several researchers (Freedman, [1981] 1992; Rafter, [1985] 1992a; Zedner, 1991) have focused attention on this much neglected field.

Despite these recent contributions, the most extensive information gathered focuses on developments of the late nineteenth and early twentieth centuries since public and government documents and operating reports are more readily available for this period.



Rafter (1985:189-190) has noted the difficulty of doing historical research on women's prisons due to the growing trend of correctional departments to produce operating reports for in-state circulation only. This practice makes it difficult for out-of-state researchers to obtain the documentation needed for their studies. She further observes that even developing a classification of new facilities for women is complicated. There are women's prisons that had been converted to co-correctional facilities that have recently returned to housing only women. This confounds their classification as "new" even though they have been in existence for many years. Given the barriers presented by unavailable data and the reluctance of state officials to share records with out-of-state researchers, Rafter believes that the history of women's prisons will have to be constructed one study at a time.

Out of concern for this need, in addition to examining the unintended consequences of an 'equality ethos' on women's prisons, this dissertation also seeks to contribute to the growing body of literature on the creation of prisons for women.

Therefore, the purpose of this research is to examine two primary questions:

1. What were the conditions that led to the creation of the New Hampshire State Prison for Women, for which legal reform seeking parity of treatment with male prisoners was sought, i.e., what situation were the inmates attempting to improve through the use of legal reform?

and

2. What unintended consequences may have resulted from this reform on the criminal processing of felony offenders who have entered the justice system since the prison has come into existence, i.e., is the situation of female offenders benefited or worsened by the creation of a women's prison?

Given the limitations of extant data and records, this study is intended to be preliminary

and exploratory.

### Method

This research combines a qualitative study of the female offender in New Hampshire and the conditions that led to the creation of the New Hampshire State Prison for Women with an empirical analysis of sentencing trends in one county superior court district for approximately four years before and following the existence of the prison.

### Qualitative Analysis

Aside from a review of the scholarly literature on women and crime, and the treatment of women in the justice process, the qualitative analysis examines local, state and national statistics on female arrests, conviction, sentencing, and incarceration and state archival documents on the female offender and prison expansion in New Hampshire.

The primary statistical sources used are the Uniform Crime Reports, American Correctional Association Reports, United States Department of Justice Reports that include National Institute of Justice Reports, National Institute of Corrections Reports, and Bureau of Justice Statistics Bulletins and Special Reports, and New Hampshire Department of Corrections Reports.

The primary limitation of the use of these official statistics is that they are gathered for informational purposes and to assist inform criminal justice administrators in planning decisions. However, such statistics, nonetheless, provide the most comprehensive source of data available for studying the justice process. A more complete discussion of the limitations of official data is provided in Chapter 2.

The archival documents that were examined include the following: (1) Biennial

State Prison Reports from 1850 through 1992; (2) Biennial State Board of Charities and Corrections Reports; (3) State Legislative and Executive Reports, and other special investigative, building, and commission reports and hearings on the state prison. This includes documents pertaining to early correctional conditions as well as the recent expansion of the prison; (4) Essays, memoirs, and public statements on early prison conditions; (5) Legal documents, internal memoranda, correspondence, depositions, and court orders relating to the federal lawsuit, Fiandaca v. Cunningham; and (6) Press coverage surrounding the creation of the New Hampshire State Prison for Women and prison expansion in general.

The qualitative analysis was designed to retrieve and construct as much of the record as is possible of female offenders under state sentence prior to the existence of the women's prison and of the conditions that led to the creation of the prison. Additionally, in order to explore changes in the criminalization of women since the creation of the prison, the qualitative analysis is augmented with a quantitative analysis. This analysis examines trends in the prosecutorial processing and in the sentencing of female felony offenders in one county superior court for a specified time period before and after the prison's existence was conducted.

#### Quantitative Analysis

It is a commonly held, but empirically untested, assumption that if prisons exist, judges will fill them by increasing the frequency and duration of incarcerative sentences. The implication of this assumption is that, all other factors being equal, less serious offenders that may have otherwise remained in the community under supervision or

treatment will instead be subjected to harsher prosecutorial and judicial screening and sanction (Feinman, 1986:26; Pollock-Byrne, 1990:185; Daly, 1991:8, 19; Chesney-Lind, 1992:32; Rafter, 1992b).

Women traditionally commit crimes that are less serious, and have an extremely low incarceration rate (Simon, 1975; Sutherland and Cressey, 1978; Nettler, 1978; Adler and Simon, 1979; Smart, 1981; Chilton and Datesman, 1987; Naffine, 1987; Gottfredson and Hirschi, 1990; Pollock-Byrne, 1990). If institutional availability affects prosecutorial and judicial decision-making, it is expected that an increase in the volume and length of prison sentences for women would occur independently of an increase in severity of the offenses committed by women after the creation of the women's prison.

However, due to the limitations of available data and the exploratory nature of this research, this study was not designed to test formal hypotheses that establish a causal relationship between institutional availability and sentencing. Researchers have noted the complexity of the sentencing process and the difficulty of rigorously controlling for the variety of legal and non-legal factors that influence court processing (Steffensmeier, 1980; Kruttschnitt, 1982; Feeley, 1983; Kruttschnitt and Green, 1984; Smith, 1984; Wilbanks, 1986; Ghali and Chesney-Lind, 1986; Chesney-Lind, 1987; Daly, 1989; Moyer, 1992; Boritch, 1992). The political, social, cultural, economic, and organizational factors that influence the criminal justice process are numerous. Furthermore, the complexity of their nature and the fluid and dynamic manner in which they interact in their effect is difficult to operationalize for causal analysis. The mode of inquiry that is pursued is intended to empirically examine some specific questions surrounding the criminal processing of female

felony offenders since the prison has come into existence without postulating a causal relationship. These questions are predicated upon the assumption that there will be an observable difference in the manner in which women are processed and in the frequency and severity of sentences which women receive in the time period that has elapsed since the creation of the women's prison.

Court data was available from 1986 through May 31, 1993. The New Hampshire State Prison for Women was established on November 13, 1989. The postprison period, therefore, is November 13, 1989 to May 31, 1993, or 42 months and 18 days. In order to establish a baseline of processing trends prior to the opening of the prison, a comparable preprison time frame was chosen. The preprison time period is from January 1, 1986 through November 12, 1989, or 46 months and 12 days. The specific questions addressed by this research are:

- (1) Does the frequency of prosecution of female felony offenders increase between time periods?
- (2) Does the frequency of commitments of female felony offenders increase between time periods?
- (3) Does the severity of sentencing, as measured by type of sentence, increase between time periods?
- (4) Does the length of sentence for those sentenced to incarceration increase between periods?
- (5) Are variations in processing and sentencing decisions between periods related to severity of offense?

The study population for this research is all female felony offenders processed by the Hillsborough County Superior Court between January 1, 1986 and May 31, 1993.

There were 762 cases processed by this court during this period. Shrinkage due to incomplete files was 3.4%, leaving a total number of 736 cases for analysis.

The population was limited to Hillsborough County Superior Court due to practical restraints. New Hampshire has developed a unified court system that is organized by county. Each county in New Hampshire constitutes a court district which has jurisdiction over all felony arrests, except murder, that occur within that county. Murder cases are referred to the State Office of the Attorney General for prosecution. Since court documents in New Hampshire are neither centralized<sup>3</sup> nor computerized, records are maintained in each county superior courthouse. Records consist of file folders that are stored in file cabinets and storage boxes. Once a case is disposed, it is assigned a chronological number and filed. These records are not classified by offense or by gender, only by the date closed. A cross-reference listing is maintained of each case by name and number, however, no other information is kept in this listing. Therefore, any research using court records requires manually searching these files. Although the number of female offenders is relatively small, obtaining any information on them, including just their numbers, means searching every file maintained by the court for the time period in question. In Hillsborough County, this is approximately 2,000 files per year.

Selection relied on the offender's name as the indicator of gender. A conscientious effort was made to inspect every file where the name was either a known woman's name, both masculine and feminine, or of uncertain gender. However, any file of a woman with

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<sup>3</sup>The one exception to this is that the Superior Court Center keeps a handwritten log of all state prison sentences. Entries are not categorized by gender, however.

a traditionally male name would have been excluded. Once obtained, each file was read to retrieve the necessary data.

Hillsborough County was chosen for several reasons. It is the largest county in the state and contains the two largest cities, Nashua and Manchester, in its jurisdiction. It is a predominantly urban county, and the caseloads at the court are among the highest in the state. Additionally, the highest percentage of commitments to the state prison (35.7%) from 1988 to 1990 was from Hillsborough County (Department of Corrections, 1988-1990:32).

Between group differences in court referrals, prosecutions, and type and length of sentence were compared, controlling for offense category. Internal validity was strengthened by a comparative analysis of incarceration rates in New Hampshire with those of the nation to determine whether the rate of change is proportionately consistent with national trends. Statutory or policy changes within criminal justice can also affect processing decisions. A combined use of qualitative and quantitative analysis was used to address the impact of statutory or policy changes in processing decisions.

### Organization

Chapter 2 examines the nature and extent of female criminality and the treatment of women in the justice system. After centuries of neglect by the criminal justice system and seventy years of neglect in criminological theory and research, the topic of women's crime has generated considerable debate. The observation in the mid-1970's that the Women's Movement was causing female crime to change in expression and to rise at a disproportionately faster rate than male crime stimulated research designed to address the

"liberation thesis." As a result, a large body of literature has developed over the past twenty years that has sought to explain female criminality and gender-based differences in the processing of female offenders through the justice system. Although there is consensus that arrest and incarceration rates for women are rising, most of the literature on gender differences in crime and criminal processing is characterized by ambiguous and conflicting research findings (Ghali and Chesney-Lind, 1986; Moyer, 1992). As a result, research has collectively failed to provide a cohesive and cumulative body of knowledge that furthers our understanding of the female offender. Theoretical explanations of female criminality have remained weak and poorly developed which contributes to the ambiguity and contradictory nature of the research. Thus, debate continues over basic etiological questions surrounding the nature and extent of female crime and whether women offenders receive differential treatment from men in the justice process.

The review of extant literature is not conducted for the purpose of resolving the debate over what Howe (1990:6) has referred to as "old etiological questions" or that over the effect of gender on the justice process. Rather, its purpose is to understand the dimensions of this debate and to create a conceptual framework for developing a meaningful explanation of the rising incarceration of women, the special problems posed by growing female correctional populations, and the unintended consequences of legal reform that seeks to redress the correctional problems of female inmates through seeking parity of treatment with male inmates.

Through an analysis of arrest and incarceration rates, this research demonstrates that not only is incarceration being used more often as a response to female crime, but also



that women are being incarcerated for offenses that in prior years would have received a non-institutional sentence. The correctional treatment of female offenders is examined within an historical perspective that traces the punishment of female offenders from the use of corporal punishment through the emergence of institutional control in modern society. As correctional populations increase, the problems of the female inmate become more acute, more visible, and more demanding of amelioration. The resultant increase in litigation to legally reform correctional conditions for female prisoners has produced unintended consequences that may not ultimately serve to benefit either female offenders or society.

Chapter 3 examines the correctional treatment of women, the general characteristics and needs of women in prison, and explores the problems posed by legal solutions to correctional problems.

Chapter 4 provides a study of the use of litigation to create a women's prison in New Hampshire. It begins with an examination of the female offender in New Hampshire and the conditions that led to the lawsuit filed by female inmates demanding their own prison. It concludes with a look at the issues not resolved by litigation and the limitations of a parity standard, as applied in a correctional setting, in meeting the needs of incarcerated women.

Chapter 5 augments the qualitative analysis of the use of legal reform to redress the correctional problems of female offenders in New Hampshire with an empirical study of sentencing trends in one superior court district. This chapter explores some unintended consequences legal reform has had on the criminalization of female offenders since the

prison was created.

Chapter 6 concludes with a discussion of the broader implications of the increased use of incarceration of women. As a microcosm of society, women's prisons have much to teach us about the structural position of women in society and the relationship of gender to social relations. The gender stereotypes that have defined the role and treatment of women prisoners reflect the gender attitudes that have defined the structural role of women in the general society. The primary question this chapter addresses is whether the use of legal reform and demands for parity provide the most effective solution to the correctional problems of incarcerated women.

## CHAPTER II

### FEMALE CRIMINALITY AND THE TREATMENT OF WOMEN IN THE CRIMINAL JUSTICE PROCESS

#### Introduction

The low incidence and visibility of female crime caused the female offender to be viewed as insignificant by both scholars and criminal justice practitioners (Smart, 1981:7). This began to change almost twenty years ago when scholars noted that female crime, as indicated by arrest rates, was rising. This rise was attributed to the women's liberation movement and increased opportunity for women to commit crime (Simon, 1975; Adler, 1975). Since then, a debate has dominated this literature over whether an equality ethos is causing female criminality to converge with that of male offenders or whether demands for equality have caused justice officials to perceive women as more criminal and process them in an manner equal to men (Klein and Kress, 1979; Steffensmeier, 1980). This chapter will conduct an extensive review of the literature on women and crime in order to examine the relationship between an emerging equality ethos (Daly, 1990), female crime, and the treatment of women in the justice process.

It will begin with a discussion of the debate surrounding the existence of a new, liberated female offender and the relationship between the women's movement and rising female arrests. The weakness of extant theory, the methodological limitations of official

sources of crime data, and the importance of studying female crime within the context of broader social, political, economical, and historical events will be covered. The chapter will conclude with an examination of the influence of gender on the criminal processing of female offenders and the relationship between changes in gender roles and mechanisms of social control in modern society and rising arrest and incarceration rates of women.

### The Forgotten Female Offender in Criminological Literature

Following decades of neglect and invisibility, the female offender has become the subject of growing theoretical and research interest. Historically, criminology has either ignored female crime or limited its study to a few gender-specific theories rooted in biological or psychological determinism.

There is an irony to this since criminologists have noted for some time that the only stable variable associated with criminality has been gender. Across all cultures, all times, all places, and all offenses except infanticide and abortion, women have had lower crime rates than men (Sutherland and Cressey, 1978:135; Naffine, 1987:1; Chilton and Datesman:1987:152; Gottfredson and Hirschi, 1990:145). Yet, little effort was devoted to understanding why and how sex ratios in crime varied. Instead, crime was seen as a male phenomena and the female offender as an anomaly warranting little study or explanation.

For over five decades, the writings of Lombroso (1920), Thomas (1923), Freud (1933), Glueck and Glueck (1934), Knopka (1966), Cowie, Cowie, and Slater (1968), and Vedder and Somerville (1970) constituted the core body of literature on women and crime. Locating the etiology of female crime in individual biological or psychological

motivations rather than in the political, economic, and social-structural factors that were more often used to explain male crime, these writings were allowed to stand virtually unchallenged for many decades. This "individual pathology" model (Smart, 1981:11) developed out of cultural assumptions regarding the nature of female behavior based more upon lay knowledge than upon empirically-derived evidence (Klein, 1979:58-59; Smart, 1981:7; Davis and Stasz, 1990:216). However, since these studies were presented in scientific language, cultural beliefs about the natural role of women were reinforced by being elevated to the level of facts. Armed with scientific evidence, research could then be translated into policies intended to change the individual offender rather than society. Law, the judicial system, and penal sanction became united in policies designed to restrain, reform, and resocialize deviant women back into their "natural roles of wives, mothers, nurturers" (Smart, 1981; Feinman, 1981:384-389).

Smart (1981:7-12) has criticized these early works for both failing to contribute to the development of our knowledge of female criminality and for continuing to exert a negative intellectual influence over criminological theory and research and criminal justice policy. She states that "as a consequence of this lack of development, the ideology and methodological limitations inherent in some of the classical works on female criminality still inform contemporary studies, and, furthermore, are reflected in the treatment of female offenders." Accordingly, she believes that the "anti-theoretical" and "anti-intellectual" nature of early criminological explanations of female criminality has encouraged policy-makers to ignore theoretical issues of gender-based differences in class, status, and power and focus instead on "practical issues" of technocratic control of

women.

Although traditional criminology has attributed this lack of scholarly interest to the small number of female offenders, not all contemporary theorists accept this as a full explanation. Smart (1981:7) sees the invisibility of the female offender as "symbolic of the nature of the discipline of criminology." According to her and other theorists, it is the nature of criminology to accept official statistics on crime and official definitions of social problems as true measures of their reality, despite rhetorical acknowledgements of the differences between the two. Since official crime rates for women were low, and the offenses recorded were, for the most part, petty property violations or domestically rooted violence, female offenders were not officially perceived as a threat to the existing social order. Consequently, concern with bringing their behavior under formal social control was low, and financial support of research on female crime was not readily available. The combination of these two factors resulted in relatively few studies being conducted (Smart, 1981:7; Moyer, 1985:10; Naffine, 1987:1-7).

#### The Rediscovery of the Female Offender

Beginning in the early 1970's, the neglect of the female offender and the narrow theoretical focus of extant literature were being challenged by the emergence of feminist critique which sought to incorporate a feminist perspective and voice into the epistemology of mainstream criminology.

Feminist criminologists wanted to liberate the study of female criminality from explanations of individual pathology and locate it within the same broad structural conditions that explained male criminality. Scholars like Klein (1973) and Smart (1976)

focused attention on the ways in which power, status, and authority are hierarchically structured on the basis of gender. Their works seemed to be establishing the direction for future theory and research. However, before this critique was fully articulated, the works of Freda Adler (1975) and Rita Simon (1975) directed the attention of scholars toward the impact of the women's movement on changing patterns of female crime (Simpson, 1989). Their respective books, Sisters in Crime and Women and Crime, did more to generate research into the nature and causes of female crime than any other publications up to that time.

Adler and Simon observed that female crime was increasing in frequency and changing in expression. Their explanations centered on the changing role of women in modern society. They identified the existence of a "new" female criminal as an emergent response to increased economic opportunities that were attributable to the women's liberation movement. Their thesis stated that as women achieve social and economic equality closer to that of men, female behavior will become more masculinized in all areas including crime, Adler (1979:93-94) predicted a convergence in the quality of female criminal expression, expecting both property and violent crime to increase. Simon (1975:2), on the other hand, predicted that violent crime, which is primarily directed against the family, would decrease due to increased labor force participation which would reduce the isolation, dependency, and frustration of women in the home. Correspondingly, property crime would increase as a result of increased opportunity to commit crimes of larceny and embezzlement in the workplace. Since the women's movement was seen as responsible for these changes in opportunity and behavior, this idea

is referred to in the literature by several different terms -- such as, "liberation hypothesis," "opportunity thesis," and "masculinization thesis." For the sake of consistency, the term "liberation hypothesis" will be used in this paper.

Since the "liberation model" was advanced, two major questions have dominated criminological literature on women and crime. First, does a new "liberated" female criminal exist - more active, more criminally sophisticated, more 'masculine' in both the extensiveness of her criminality as well as in criminal expression, than her predecessor? In essence, this questions asks if the nature and extent of female criminal behavior is converging with that of male offenders.

Second, research has questioned whether changes in female criminality are an unfortunate by-product of the women's movement. The assumption is that, women's liberation, by reducing the normative and structural restraints that limited legitimate social and economic opportunities for women, also reduced the restraints on illegitimate opportunity structures, causing female crime to increase. The emergent question is whether the women's movement is criminogenic and gender equality in crime the price modern society must pay for gender equality in other areas of social life. While many scholars (Klein and Kress, 1979; Steffensmeier, 1980; Giordano, Kerbel, and Dudley, 1981; Box and Hale, 1984; Feinman, 1986) have been quick to challenge this argument, the full relationship between the women's movement and crime is still being explored by contemporary research, particularly its effect on the perception and treatment of female offenders by justice officials.

The examination that is to follow will address both of these questions by reviewing



the debate surrounding the liberation hypothesis as it developed in the literature. It will also examine the weaknesses inherent in official crime data that must be considered in order to understand trends in female arrest rates and to critically evaluate the assumptions of this thesis. A related issue that will underscore this examination is that of the unintended consequences of an equality ethos on the perception and treatment of the female offender, and the question of how this ethos affects the criminalization process. Where the liberation hypothesis has explained female crime on the basis of increased opportunity and motivation of women to commit crimes due to increasing gender equality (Simon, 1975; Adler, 1975), some scholars have asked whether the rise in female arrests and the increased use of incarcerative sentencing is more reflective of a "backlash" against women (Steffensmeier, 1980:353-355; Daly, 1990:8-14; Rafter, 1992a:203). This question of unintended consequences, therefore, provides a conceptual framework for understanding how demands for equality have affected the female offender from arrest through incarceration and in the use of litigation to reform women's prisons.

#### The Liberation Hypothesis -- Does a "New" Female Offender Exist?

The central thesis of the liberation hypothesis-- that female crime will rise as the social role of women comes closer in equality to that of men--is not a new idea. Criminologists have observed for many years that although the crime rate of males always exceeds that of females, the magnitude of the sex-ratio fluctuates in accordance with the degree of social, political, legal, and economic equity women experience at a particular time or place ( Sutherland & Cressey, 1978:131-133; Nettler, 1978:122-123; Adler, 1979:409-410; Lopez-Ray, 1979:401).

As early as 1905, Bonger's research postulated a relationship between the structural position of women in society and crime. His (1979:20) examination of conviction and sentencing statistics from 1886-1901 in Italy, Germany, England, Wales, France, and the Netherlands, found lower rates for women in comparison to men. He attributed this difference less to gendered differences in morality than to the more restrictive and regulated social environment of women. Bonger predicted that while the nature of female crime may remain distinct from that of men, its extent would be likely to increase under social conditions of greater gender equity.

Other researchers (Sutherland and Cressey, 1978:131-133) have similarly observed that sex-ratios in crime varied with social position, race, community size, area of residence, age, and time. Thus, in countries like Algiers, Tunis, or various nations and districts of Africa, where the degree of social distance that exists between men and women is great, sex ratios in crime can be as high as 204 males to every female. In contrast, during a comparable time period, studies have found that countries with less social distance, such as Denmark and Great Britain, had closer sex-ratios in crime, 8 to 1 and 6 to 1 respectively (Nettler, 1978:123).

The relationship between social distance between men and women and sex ratios in crime follows the same pattern in the United States. Although the crimes of men have always and continue to exceed those of women in both absolute numbers and in relative terms, the sex ratio in crime has been steadily decreasing.

As Table 3 shows, in 1932, 1 out of every 13.5 persons arrested was female (Simon, 1981:23), but by 1992, the sex ratio had decreased to 1 out of every 5.3 arrests.

In addition to revealing a rising female arrest rate, arrest statistics for this period show a change in the nature of female crime as well. Traditionally, women were more likely to be arrested for crimes of violence than for property crimes. From 1932 until 1962, the percentage of female arrests for violent crime exceeded the percentage of arrests for property crime (except for 1946 when arrests were equal). In 1962, however, for the first time, more females were arrested for property crime than for violent crime. Over the next decade, while violent crime arrests remained relatively stable, property crime arrests continue to rise disproportionately at a rate of approximately 2 to 1 (Simon, 1979). By 1992, the sex ratio for property crime arrests had decreased from 1 out of every 18.9 arrests to 1 out of every 4. In comparison, the sex ratio for violent crime had decreased from 1 out of every 15.4 arrests to 1 out of every 8 (Uniform Crime Report, 1992:234).

It was this change in criminal expression, even more so than the overall rise in female arrests, that led Simon (Adler and Simon, 1979:113) to speculate that as economic opportunity for women increased the opportunity for women to commit economic crimes would also increase and to link this increase with the women's movement.

According to Simon (Adler and Simon, 1979:104), "woman's participation in selective crimes will increase as her employment opportunities expand and as her interests, desires, and definitions of self shift from a more traditional to a more liberated view."

In support of this thesis, Simon (1981:22-30) analyzed arrest rates within sex cohorts from 1953 to 1972. She found that in 1953, the percentage of males and females arrested for violent crime was low and fairly equitable--2.2% of female arrests and 2% of male arrests. Female arrests for violent crime remained relatively stable over the

next

Table 3. Female Arrests, as a Percentage of All Persons Arrested, for All Crimes, Violent Crimes, and Property Crimes, 1932-1992

YEAR	ALL CRIMES	VIOLENT CRIMES	PROPERTY CRIMES
1932	7.4	6.5	5.3
1933	7.2	7.1	5.2
1934	6.9	6.8	5.3
1935	6.9	7.3	5.3
1936	7.3	8.0	5.7
1937	6.9	7.4	4.8
1938	6.8	7.0	4.6
1939	7.6	7.9	5.1
1940	8.5	8.4	5.6
1941	9.2	8.8	6.2
1942	12.0	9.8	8.3
1943	16.1	10.5	9.9
1944	17.1	11.1	10.2
1945	15.5	10.6	9.6
1946	10.7	7.7	7.7
1947	10.3	8.3	7.8
1948*	10.0	9.1	7.7
1949	9.9	9.9	7.3
1950	9.6	9.4	7.2
1951	N/A	N/A	N/A
1952	10.8	12.7	8.5
1953	10.8	11.9	8.5
1954	10.9	11.6	8.2
1955	11.0	12.0	8.4
1956	10.9	13.5	8.0 *
1957	10.6	13.1	8.5
1958	10.6	11.9	9.3
1959	10.7	12.7	10.0
1960	11.0	11.8	10.8
1961	11.3	11.6	11.4
1962	11.5	11.5	12.6

Table 3. Female Arrests, as a Percentage of All Persons Arrested, for All Crimes, Violent Crimes, and Property Crimes, 1932-1992

YEAR	ALL CRIMES	VIOLENT CRIMES	PROPERTY CRIMES
1963	11.7	11.6	12.9
1964	11.9	11.6	13.9
1965	12.1	11.4	14.9
1966	12.3	11.3	15.6
1967	12.7	10.8	16.0
1968	13.1	10.3	16.1
1969	13.8	10.6	17.9
1970	14.6	10.5	19.7
1971	15.0	10.9	20.1
1972	15.3	11.0	21.4
1973	15.3	10.2	21.1
1974	16.1	10.2	21.2
1975	15.7	10.3	21.7
1976	15.7	10.5	22.1
1977	16.0	10.4	22.4
1978	15.8	10.2	22.4
1979	15.7	10.2	21.8
1980	15.8	10.0	21.0
1981	16.3	10.1	21.4
1982	16.3	10.4	22.1
1983	16.6	10.8	22.5
1984	16.7	10.7	23.4
1985	17.4	10.9	24.0
1986	17.4	10.9	23.9
1987	17.7	11.1	24.4
1988	17.8	11.4	24
1989	18.1	11.4	24
1990	18.4	11.3	25.3
1991	18.7	11.6	25.4
1992	19.0	12.5	25.5

Source: Uniform Crime Reports, 1932-1992

\*1948 arrest statistics are from January through June only

twenty years, rising only 7/10ths of one percent to 2.9% in 1972. Male arrests for violent crime, however, rose steadily from 2% in 1953 to 4.4% in 1972, exceeding female arrests by more than two to one.

Arrests for property crime, however, revealed a different pattern. In 1953, 5.6% of females and 7.2% of males arrested were arrested for property crime. By 1972, females were 4 times more likely to be arrested for property crime (22.3% of female arrests) than they had been 20 years prior while males were only twice as more likely to be arrested for property crime (14.8%). Arrests for serious crime<sup>4</sup> rose considerably for both males and females, almost tripling for females, from 7.8% to 25.2%, and more than doubling for males, from 9.2% to 19.2%. The rise in male arrests for serious crime is explained by an overall rise in both property and violent crime. However, the rise in female arrests for serious crime is explained almost entirely by the rise in property crime arrests.

Additionally, Simon demonstrated that the increase in female arrests for property crime was most pronounced for larceny-theft, forgery and counterfeiting, and embezzlement/fraud, which increased 16.8, 14.6, and 14.3 percentage points each, respectively. Other property crimes like burglary and auto theft only increased 3.1 percentage points. Drug arrests remained stable for this period at 15.7%.

Based on this analysis, Simon concluded that violent crime would stabilize or decrease and property crime would increase. Other researchers (Steffensmeier, 1981; Feinman, 1986; Giordano, et. al., 1981) using different methods of analysis, have reached

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<sup>4</sup>Serious crime is defined as homicide and non-negligent manslaughter, aggravated assault, robbery, burglary, larceny, and auto theft (Simon, 1979:103).

similar conclusions although their interpretations of what these changes signify about female criminality differ from Simon's. The greatest disagreement has centered around Simon's explanation that the women's movement is the cause of these changes in female crime.

### The Women's Movement and Rising Female Arrests

The identification of the women's movement as criminogenic was quickly challenged by scholars. Klein and Kress' analysis (1978:86-89) of crime data disputed Adler's prediction of the emergence of a liberated and violent female criminal. They criticized criminological research as being narrow and inadequate for attempting to explain female criminality without examining the social relations that systematically oppress women in modern capitalist society.

According to Klein and Kress, the economic and social roles of women are historically rooted in the family which defines woman's nature in accordance to what is socially needed as woman's work. In pre-industrial society, the family was the center of production and woman's work had "use-value." This is lost in modern society, where the family is the center of consumption not production. Women's work has been transformed so that it now has "exchange value"<sup>5</sup> in that it supports the family. Women's work consists of caring for family members whose labor has use value, socializing children in the values that maintain the legitimacy of capitalist structure, and consuming goods produced by a market economy.

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<sup>5</sup>Use of the terms "use value" and "exchange value" reflect my interpretation of Klein and Kress's ideas in the context of Marx's use of these concepts in his labor theory of value, *Capital: A Critical Analysis of Capitalist Production*, volume 1 (1967).

The types of petty property crimes that women primarily commit reflect their economic need and their structural position in society as "consumers" not "producers." Forms of female criminal expression reproduce in the illegal marketplace the structure of sexism that exists in the legitimate marketplace. Just as legitimate opportunity structures for economic and political power are blocked and keep women out of professional and managerial roles, illegitimate opportunities to upper levels of organized and professional crime are structurally blocked and sexually stratified. The criminal style of women as accomplices to a male partner (Ward, Jackson, and Ward, 1980:180-183; Pettiway, 1987:742), similarly reflects the subservient role of women in society--the role of women as helpmate.

Klein and Kress did not totally reject Simon's assumption that increased liberation would bring changes in female criminality. However, they expressed skepticism that increased economic opportunities would eradicate sexism. They believe that a sexist cultural ideology would continue to disproportionately lock women into low-level, low-paying jobs. This would, at best, result in a stabilization of the female crime rate. If an economic decline were to occur, they predicted that traditional female crimes, like welfare fraud, petty property crimes, and prostitution, would likely increase.

This challenge of the women's movement as criminogenic was supported by others as well. Steffensmeier (1978; 1981) argued that the gender gap had only narrowed for property crimes not for violent crime. He did not attribute increased property crime arrests to the women's movement but to broader social changes that were responsible for a gradual increase in overall arrests, the onset of which predated the women's movement.



Using rates that controlled for fluctuations in the female population rather than frequency of arrests, he explained rising arrests as the result of increased economic need, and changes in surveillance, reporting, and law enforcement practices which were bringing more women into the system. He found that although serious crime and larceny arrests increased, burglary and auto theft arrests decreased. He attributed the rise in property crime to increased arrests for larceny/theft which accounted for four-fifths of female arrests for serious crime and one-fourth of total female arrests. However, Steffensmeier did not interpret the increased arrests for these crimes as signifying increased economic opportunity. Instead, he observed that larceny consisted of shoplifting, welfare and credit card fraud, and other crimes consistent with women's domestic and low-level economic roles. Like Klein and Kress, he does not interpret these crimes as evidence of a new social role, but rather as reflecting an extension of the traditional female domestic role.

Steffensmeier (1980: 353-355) does not see the women's movement as being totally without effect in narrowing the gender gap in crime and sanctioning, but believes the changes that have been occurring in female arrests are more likely due to changes in society and the justice system. Primarily, he attributes the civil rights movement with raising awareness and concern for the importance of basing justice decisions on more objective legal criteria. In conjunction with this, criminal justice has become more professionalized and bureaucratic in its operation. The increased adoption of standards and emphasis on the development of and adherence to more uniform procedures has put more parameters around discretion. Consequently, legal criteria will increasingly dominate over offender characteristics as the basis for decision-making. He states (1980:356):

Inasmuch as the women's movement both reflects and reinforces the issue of equal rights and more formalized treatment of citizens generally, it is likely to have had some effect, albeit a rather indirect and small one, on sex differences in criminal justice outcomes...more equal treatment of male and female defendants may be occurring irrespective of whether there are changes in cultural attitudes toward women and perhaps in spite of enduring attitudes of paternalism toward women on the part of many criminal justice agents.

Thus, Steffensmeier believes that even with the persistence of paternalistic attitudes, gender differences will disappear when the perception of dangerousness and reform potential change.

The existence of a new, liberated female criminal was further challenged by Giordano, Kerbel, and Dudley (1981:80-81). Their use of police blotters as their data source provided greater demographic information on female offenders than the broad offense categories of the Uniform Crime Reports. Their research found most female offenders to be young, unmarried, and poor, committing crimes mostly of shoplifting and petty theft. Rather than revealing a liberated, professional woman engaging in white collar property crime, they found the typical offender to be "economically marginal," using crime as a means of survival.

This view was reiterated by Feinman (1986:21-28) who also disagreed that the women's movement was a sufficient explanation of rising arrests since female offenses were less reflective of white collar crime than petty theft, shoplifting, and lower-level employee theft. Her analysis of female arrests from 1960 to 1983 found that most female arrests were for larceny theft. Of the 10 crimes for which women are arrested most frequently only larceny/theft (which ranked first) and aggravated assault (which ranked

tenth) were Part I<sup>6</sup> crimes. The pattern of female criminal activity remained fairly stable and did not appear to be substantially different in nature for this period. Furthermore she found that the demographic characteristics of incarcerated women do not reflect an upwardly mobile white collar criminal taking advantage of increased occupational opportunities to commit property crimes of embezzlement, forgery, or fraud. To the contrary, they are young, poor, uneducated, unskilled, often mothers, who, if employed, work in blue collar occupations. Their crimes are those of petty theft, prostitution, or drugs. Interviews she conducted with offenders did not reveal an awareness of or active involvement in the women's movement.

Feinman questioned the degree to which deviant women relate to the women's movement, seeing it instead as a movement involving more middle-class women that is quite distant from the lives of inmates. Based on interviews with women who work with female offenders she predicted that as the quality of poor women's lives continues to deteriorate and the strain of economically surviving grows more difficult, criminal behavior, both violent and non-violent, is likely to increase. These causes are far removed from the women's movement and increased economic opportunity. According to Feinman (1986:28):

The women's movement has neither involved nor benefited the majority of women in the United States. It has not even brought true equal opportunities for the minority of white middle- and upper-class women who have been most directly

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<sup>6</sup>Part I crimes, or Index Crimes, are the offenses used in the Uniform Crime Reports as an indicator of the most frequently committed serious crime in America which provide the basis for calculating the annual crime rate. They are murder and non-negligent manslaughter, forcible rape, aggravated assault, robbery, burglary, larceny-theft, auto theft, and arson (Uniform Crime Reports).

involved with the movement. Therefore, any discussion of the link between women's criminality and the women's movement is unrealistic. It only serves to perpetuate myths; it hinders efforts to learn the real causes of women's criminal behavior and to try to eliminate them.

Feinman attributes the real causes of rising female arrests to changes in law enforcement practices and increased economic need and drug dependency of women. She (1986:22) has observed that the time period being examined by much of the research on gender and crime, the 1960's through the mid-1980's, was one of tremendous social change and upheaval--much of it centering around changes in the lives of women.

Feinman (1986:20-32) has identified several social events that occurred during this time period that must be considered in explaining changing female crime. These events include increased drug use, policy and statutory changes, economic transitions, and a general change in attitudes of the public, police, courts, and crime victims toward crime and law and justice issues.

Drugs. The use of drugs increased for both males and females during this period. Feinman (1986:21) reports that 85% of female inmates in New York City were drug addicts, and 30% of female heroin addicts supported their drug habit through crimes like prostitution, drug sales, and shoplifting versus through employment income.

Policy and Statutory Changes. The creation of the Law Enforcement Assistance Administration (LEAA) during this period increased funding for police personnel, equipment, and training. The use of telecommunications and computers was also greatly expanded. It is reasonable to expect increased personnel, training, and technological advances in communication and reporting would increase arrest rates (Walker, 1983:22-

23).

Also, governmental policy, statutory changes, and the creation of additional social welfare programs can create new crime categories that differentially impact women. For example, expanding welfare programs can provide increased opportunity for welfare fraud (Feinman, 1986:22; Steffensmeier, 1981:52).

Economic Transitions. American society experienced dramatic economic shifts during this period. The economic abundance of the sixties, gave way to the recession of the seventies, followed by an economic expansion in the eighties that resulted in disproportionate economic growth for the more affluent sectors of society and sustained economic decline for the lower economic groups. The income gap grew larger with much of the decline disproportionately experienced by women, and "feminization of poverty" became a new term (Zopf, 1989:1; Goldberg and Kremen, 1990:1-2).

As women swelled the ranks of the poor and economically marginal, technological changes in banking and retailing were increasing opportunities for consumer crime. Telemarketing, self-service shopping, expanded use of checking accounts, credit cards, and automatic teller machines facilitated the transition from consumer to one engaging in consumer fraud (Steffensmeier, 1981:53; Sheley, 1991:79).

Attitudinal Changes. As overall crime increased, the public's tolerance for crime began to decrease creating pressure for officials to react more formally to crime. A shifting economy, coupled with increased consumer crime, most likely reduced the tolerance of stores, businesses, and employers for employee theft, shoplifting, and consumer fraud--the crimes that are committed most frequently by women (Steffensmeier,

1978; 1980; Giordano, et.al., 1981). Reduced tolerance and greater detection through electronic surveillance would increase reporting and prosecution.

The Demands for Civil and Victims Rights. The growth of victim's rights organizations also served to increase pressure on police and courts to adopt more stringent approaches to crime and offenders (Karmen, 1990:155-208). Although most of the offenses that victims have coalesced against are more often offenses involving female victims and male offenders, the more strident role of the victim in the justice process has had a diffused effect on the emphasis afforded to the rights of the offender in comparison to the victim. As part of an overall shift in consciousness about crime, it has contributed to a demand for greater severity at all levels of the justice system.

The demand for victim's rights was one dimension of an overall awareness of equal rights that continued to grow throughout this period. Civil rights, students rights, gay rights, women's rights, victim's rights, the rights of the child, of the disabled, of the elderly, of the unborn, of the dying--"rights talk" has led to a focus on equity that has permeated every facet of American life (Karmen, 1990:329-330; Steffensmeier, 1980:353-355). Therefore, it is not unreasonable to expect that police and courts would look at female behavior through different eyes. Attributing changes in female criminality solely to the women's liberation movement ignores other important contributing factors and events.

In contrast to these studies, some research (Fox and Harnagel, 1979; Austin, 1982) has found support for the liberation hypothesis. However, Box and Hale (1984) integrated the methodology used in this research with that used by Steffensmeier, whose research challenged the liberation hypothesis, and added some additional statistical

controls not included in any of the other research. They were unable to find a "clear and unambiguous" relationship between emancipation and crime. Thus, despite some disagreement that exists in the literature, the vast majority of research has rejected the idea that women's movement is responsible for rising female crime and arrest.

Almost twenty years have passed since Women and Crime was published and these questions were first raised. Where little research had previously been conducted, extensive research now exists. Yet, surprisingly, a number of questions remain unanswered concerning the nature and extent of female criminality and the treatment of women in the justice system.

#### Changes in Female Criminality and Organizational Changes in the Justice System

Several scholars (Pollack, 1952; Simon, 1975; Steffensmeier, 1980; Moulds, 1980) have questioned whether the gender gap in crime reflects lower female criminal activity or greater insulation of women from arrest, court processing, and incarceration due to chivalry by police and other justice officials. Despite a consensus that female arrests have been steadily increasing, disagreement persists over whether this reflects increased opportunity for women to commit economic crimes (Simon, 1975), increased economic marginalization and need (Giordano, et.al., 1981; Feinman, 1986), a change in police response to female behavior (Steffensmeier, 1978; 1980; Box and Hale, 1984; Feinman, 1986; Kruttschnitt, 1992:81-98), or a combination of these factors (Feinman, 1986). Additionally, some scholars have expressed concern that demands for greater social, economic, and political equality for women is producing a backlash effect that is seen reflected in rising female arrests (Steffensmeier, 1980) and rising incarceration (Daly,

1990; Rafter, 1992b).

This controversy suggests that a meaningful analysis of gender-based differences in the processing of offenders through the justice system must be informed not only by an understanding of offender behavior but, also, by an understanding of organizational changes that affect the behavior of justice personnel (Smith, 1984).

A number of scholars (Blumberg, 1979:71-121; Steffensmeier, 1980; Walker, 1983) have observed that law enforcement has become increasingly more bureaucratized through the adoption of written policies, increasingly uniform standards of crime categorization, increased training that stresses objective criteria for discretion, and higher arrests stemming from less discretion and more legalistic forms of control (Smith, 1984:34-35). Furthermore, reduced public tolerance for crime, demands for more efficiency in the justice system, and a more visible and dominant role of victims in the justice process has resulted in increased bureaucratization of legislative and court operations as well (Walker, 1983:62-72; Karmen, 1990:15-38). The development of uniform penal and sentencing codes, mandatory, determinate and presumptive sentencing, changes toward more unified court organization that increases accountability and reduces autonomy, and increased training of judges to utilize sentencing guidelines have worked collectively to reduce sentence disparity. The overall sense of awareness and concern over the seriousness of crime by the public and the entire justice system has probably contributed more to the changing treatment of women in criminal justice than would be possible by increased opportunity and motivation to commit crime or by the women's movement alone.



Cause and effect questions are not easily separated from one another. Etiological questions concerning female crime are inextricably linked to questions surrounding the processing of female offenders since theoretical explanations of gender outcomes rely on assumptions regarding the nature of female criminality. As a result, it is difficult to separate the behavior of offenders from that of justice officials who react to that behavior.

This literature review has demonstrated that extant research does not provide a clear and consistent explanation of female criminality and the effect of gender on the processing of offenders through the justice system. One possible explanation for this, which will be discussed in more detail in a later section of this chapter, is the weak theoretical foundation upon which much of the research on women and crime is based (Daly, 1989:137).

An additional reason may be linked to the reliance of researchers on official sources of crime data and the weaknesses that are inherent to such statistics. Since the quality of research is directly related to the quality of available data, it is worthwhile to first identify some of the methodological and validity problems that must be considered in interpreting crime data before returning to the question of changing female criminality.

#### The Methodological Limitations of Crime Statistics

Research in criminology is frequently dependent upon crime data derived from either self-report studies, victimization studies, or official statistics. Each of these data sources has weaknesses that affect the reliability and validity of research findings.

Self-report studies are vulnerable to overreporting due to exaggeration by respondents and are often dominated by minor offenses. Victimization studies suffer from

underreporting due to faulty memory recall, response bias, and the tendency for crime reporting to decrease the longer subjects are in the sample due to increasing awareness of crime and reduced victim cooperation over time (Beirne and Messerschmidt, 1991).

The most commonly utilized source of data are the crime and arrest rates available in the Uniform Crime Reports (UCR) published annually by the Federal Bureau of Investigation. While these statistics are probably the most reliable that are available, their limitations and the need for caution in their use have been well documented (Black, 1970:733 and 746; Hindelang, Hirschi, and Weis, 1979:995).

The UCR reports on crime in America based on offenses known to police. This data is obtained from citizen reports to local police departments of crimes that have occurred. Since not all victims report crimes to police, and not all reported crime is recorded by police, it is estimated that as many as half of all crimes that occur are lost before this point (Blumberg, 1979:8-13). The UCR also includes statistics on arrests made by reporting law enforcement agencies and on offender characteristics.

Additionally shrinkage occurs because this is a voluntary system, not all departments contribute to the UCR, and the number of agencies that report can vary from year to year. This makes comparison of crime rates or arrest rates over time particularly problematic. Smaller, rural departments, with limited personnel, are less likely to contribute than larger, urban departments. Similarly, because reporting is done at the local level of law enforcement, reports are more reflective of street crime which are more often handled by local police agencies than of white collar or political crime. These latter offenses are more often under the jurisdiction of state and federal agencies which do not

contribute to the UCR (Blumberg, 1979:25).

Therefore, the further removed statistics are from the actual behavior, the less reliable they become due to the filtering that occurs at each stage of the criminal justice process from reporting through sentencing. Researchers studying female criminality must rely on arrest statistics, even though they are further removed from the behavior than report statistics because "crimes known to police" do not include offender characteristics. While arrest data are more reliable than that from the courts or corrections, they are nonetheless still subject to prior screening and processing decisions. Since decisions not to arrest are not officially recorded, they are not controlled in most research designs. Although researchers readily acknowledge that arrest rates are not synonymous with actual criminal behavior, this disclaimer is often forgotten as their studies progress (Simon, 1975:34).

Aside from these difficulties, there are problems created by the way in which crime reports are constructed. Crimes reported are reduced to the single, most serious event for inclusion in the UCR, so a crime that included burglary, rape, and murder would be reported as murder. This reduces the overall volume of criminal incidents that occur. Similarly, because of the need to be 'uniform', offense categories are extremely broad and, thus, difficult to meaningfully interpret (Senna and Siegel, 1993:65-66). Local definitions of an offense may not be consistent with federal definitions so decisions must be made at the local level regarding how crimes will be classified for inclusion.

The offense of larceny, the offense that women are most likely to be arrested for, provides a good illustration of this. The UCR defines 'larceny' as: "The unlawful taking,

carrying, leading, or riding away of property from the possession or constructive possession of another" (Uniform Crime Reports, 1992). Offenses that come under the definition of larceny include bicycle theft, shoplifting, pick-pocketing or any theft that does not occur by force, whether attempted or completed. It does not include embezzlement, auto theft, or writing bad checks. The dollar value that determines whether an offense is classified as a felony or a misdemeanor can range from \$50 to \$2500 (Inciardi, 1993:81).

It is difficult to ascertain how serious an offense included under larceny is and how much of a threat a larceny offender poses to the society. A shoplifter who is an occasional offender is indistinguishable from a professional shoplifter on the basis of this categorization. For example, is a person who shoplifts a \$60 item in Oklahoma where \$50 differentiates a felony from a misdemeanor, the same type of offender who shoplifts \$3,000 worth of merchandise in Arkansas where \$2500 is the differentiating amount? Can meaningful comparisons be made between an offender who steals goods valued at \$100 and one whose theft is valued at \$100,00 since both offenses would be included in this category? Broad offense categories imply uniformity in severity of both offense and offender and obscure the important behavioral differences that exist (Kruttschnitt, 1992:94). It was precisely this difficulty that Giordano, et.al. (1981), sought to avoid in using police blotters rather than the Uniform Crime Reports in their study of female crime. By reading the arrest reports, they were able to study the actual behavior that resulted in the arrest.

This problem is further compounded by aggregating diverse types of offenses into summary categories. Differences in seriousness of offenses are lost when offenses that are

already broadly defined are combined in an index. Even though the UCR reports on 30 different offenses, it is the first 8, Part I, or Index crimes, that are most commonly utilized in criminological research. These crimes include 4 violent crimes--murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and 4 property crimes--burglary, larceny-theft, motor vehicle theft, and arson. These crimes were chosen as indicators of the total volume of crime in America because they are the 8 most frequently occurring serious crimes. Because index crimes must be both serious and frequent, crimes that satisfy only one of these conditions are excluded. For example, auto theft is included but kidnapping is not. Auto theft is not a more serious crime than kidnapping, but it is more frequent in occurrence, and because of the high dollar value of most automobiles, it involves substantial monetary loss. As a result, it is part of the index while kidnapping, which is a serious but infrequent offense, is not. Thus, the crimes that comprise the index are essentially not comparable offenses since they are not distinguishable by severity. Yet, they are used as an indicator of "serious" crime, or "violent" crime, or "property" crime, and the fact that they are widely disparate in nature is often obscured.

Furthermore, the use of composite indices can obscure fluctuations within the index. A drop in one crime can produce a lower crime rate for the index when all other crimes have either remained stable or even increased slightly but not enough to offset the decrease in the offense that is controlling the total rate. Similarly, crime may appear stable if an increase in one offense is offset by a decrease in another. While statistically this may produce a stable crime rate, important behavioral changes may go unnoticed. The use of

composite indices is common in research that shows female crime growing more serious in nature. Smith and Visher (1980:695) found that the gender gap in deviance is smaller when the analysis is based on a composite index rather than a single indicator.

An additional methodological weakness is in the way crime statistics are calculated. Crime rates are determined by a formula in which reported crime is divided by the United States population and multiplied by 100,000 for standardization. The use of the entire population is problematic for two reasons. First, the census is taken every ten years so estimates must be used in the interim years.

Second, the total population is used even though large segments of the population are not contributing to the incidence of crime (Inciardi, 1993:110-121). This may be helpful in understanding crime in relationship to its overall distribution in society, but it does little to help us understand the true nature and extent of crime in America. For example, if a community that is a resort area with high tourist populations reports a high occurrence of larceny, is the resident population of that community an accurate base for calculating the crime rate? This issue becomes even more significant for arrest rates which are even more vulnerable than crime rates to population and demographic fluctuations, as well as to variations in law enforcement resources and practices.

Research that compares female arrests to male arrests can be misleading because of the tremendous disparity in population size. The relationship between the size of a baseline and the magnitude of change is inverse. Thus, in a population as small as the number of females arrested, any change in the baseline will appear impressive (Pollock-Byrne, 1990:23). The problem of baselines is particularly important in research that is

based upon trend tables reported in the UCR. Since the agencies that contribute to this database change, the populations that percentages are calculated on will vary from year to year. A trend comparison eliminates statistics from departments that only reported in one of the years. Any comparison of trends, whether based upon tables constructed in the UCR or created by using annual UCR total arrest reports, will be based upon population figures that are varying due to differences in reporting. This is a serious weakness in official crime data that must be considered in drawing any assumptions about what arrest rates are telling us about changes in offender behavior.

Finally, analysis of female arrests as a percentage of total arrests is vulnerable to distortion resulting from overall changes in female population or from demographic changes in age and race distributions. The problem presented by demographic change is not a small one. Research linking rising crime to the women's movement was particularly influenced by a change in female arrests for property crime that began in the early 1960's--the same time that the women's movement was reemerging--causing the two events to be linked (Adler, 1975; Simon, 1975; Adler and Simon, 1979). Feinman (1986:11-15), however, has been more cautious in accepting such a link because of population changes that were also occurring at the time. She observed that from 1970 to 1987, the population increase of the baby-boom generation, which caused delinquency statistics to soar in the 1960's and 1970's, increased the number of people in the 18-35 year old age group--the high risk age group for adult crime. Additionally, the Vietnam war drew young males disproportionately out of the population during the late 1960's and early 1970's--possibly explaining the disproportionate rate of increase in female to male arrests during this

period.

Other researchers have also considered demographic changes in age, race and social class in interpreting statistics that show a significant increase in female arrests. Chilton & Datesman's (1987) analysis of female arrest rates from 1960-1980 found that larceny/theft explained most of the proportional increase in female crime. However, when they controlled for the interactive effects of age, race, and gender, they found that approximately 73% of increased female arrests in the 15-29 age group for larceny was due to higher arrests of black women. Further analysis of the effect of changes in the population of young, non-white women and increases in the arrest rate of non-white women across all age groups, revealed that 77% of increased female larceny arrests was due to higher arrests of non-white women.

Simpson (1991:117-119) noted that research utilizing official data is limited in its ability to examine the interaction of race, gender, and social class on crime. Although most research assumes female criminality to be non-violent, she found considerable racial and class variation within female offenders as a group. For example, black females have higher arrest rates for homicide and aggravated assault than do white females. Among juveniles, black females are arrested slightly more than 5 times as often as their white counterparts for violent crime, and this differential increases as social class status decreases. She observes (1991:129): "The simplistic assertion that males are violent and females are not contains a grain of truth, but it misses the complexity and texture of women's lives...Extant literature yields only a murky picture of essential differences between and among males and females of different classes and races."



Similarly, Smith and Visser's (1980) analysis of the empirical research on gender and deviance found that the decreasing sex ratios in crime are not evenly distributed among all offense and demographic groups. Sex ratios converge at a greater rate for juvenile as opposed to adult samples among non-white groups while remaining stable among white male and females. Convergence is also greater for personal offense categories like drug and alcohol as opposed to property or violent offenses.

Also, a comparison of gender differences in deviancy based upon research utilizing self-report studies rather than official statistics found that both types of research revealed a narrowing gender gap, but the rate of decrease is greater in the self-report studies. Since the magnitude of difference between these measures increased over time, they concluded that the indicators are measuring different latent variables, and that sex ratios are converging more rapidly for less serious offenses. They speculate (1980:698-699) that "the self-report measures may be more sensitive to actual changes in the deviant/criminal behavior of men and women than is the official data which may be an index of the response of social control agencies to that behavior."

As a result of these methodological limitations in the construction of crime data, researchers (Smith and Visser, 1980; Black, 1970:747; Beirne and Messerschmidt, 1991:39) have recognized that official statistics are probably better indicators of police behavior in responding to crime than they are of criminal behavior.

#### The Nature and Extent of Female Crime

Having ascertained that there are numerous validity problems with crime data (Kitsuse and Cicourel, 1963; Black, 1970), what knowledge about the nature and extent

of female crime can be derived from research based on current official measures of crime? To the extent that official sources of data are reliable, and to the extent that arrest can be assumed to be a measure of criminality, two trends can be identified. First, female crime, as measured by arrests, is steadily rising. Second, although violent arrests are increasing, property crimes, particularly larceny, account for most of the increase in total female arrests.

An examination of female arrests from 1930 to 1992, as presented in Table 3, reveals that despite some occasional fluctuations, arrests have been steadily rising and reached a record high of 19% in 1992. This rise has been disproportionately distributed between violent and property crime arrests.

Violent Crime Arrests. Arrests for violent crime peaked in the mid-1950's at 13.5% and then began a gradual decline, dropping to 10.8% in 1967. The female arrest rate for violent crime stabilized between 10% and 11% for the next 20 years. In 1987, arrests for violent crime began to rise again and are currently at their highest level since 1957. However, research has found that violent crimes by females are most often committed against family members or intimates. Ward, Jackson, and Ward's (1980:183) study of incarcerated violent female offenders found that over half of the homicide victims and one-third of the assault victims were husbands, lovers or children. Recent statistics reveal that nationwide 37% of the victims of women incarcerated for violent crime were relatives or intimates and another 26% were acquaintances (Greenfield and Minor-Harper, 1991:3) This is further confirmed by the National Crime Survey (Bureau of Justice Statistics Special Report, Violent Crime by Strangers and Non-Strangers, 1987:4) which

reports that 79% of the victims of violent crime by female offenders are relatives and acquaintances. Furthermore, there appears to be a relationship between women incarcerated for violent crime and having experienced prior physical or sexual abuse. Almost half of all women incarcerated for violent crime in state and federal prisons report having been physically or sexually abused prior to the crime. Approximately 40% of women reporting abuse said the victim of their violent offense was either a relative, ex-spouse, or intimate. Additionally, 32% of those who reported experiencing previous abuse were incarcerated for homicide of a relative or intimate in comparison to 19% of women incarcerated for homicide who were not abused (Greenfield and Minor-Harper, 1991:6).

Property Crime Arrests. Although arrests for violent crime are rising, arrests for property crime explain most of the increase in the female arrest rate. Property crime arrests exceeded violent crime arrests for the first time in 1962 and have been consistently and disproportionately higher every year since then. Most of the rise in property crime is attributable to an increase in arrests for larceny-theft. Larceny-theft accounts for 18% of all female arrests and 76% of female arrests for index crimes (Uniform Crime Reports, 1992).

Larceny-theft is the largest offense category for both males and females. Females are arrested for larceny-theft 5.4 times more often than they are arrested for aggravated assault, which is the second most frequently committed index crime. Furthermore, female larceny arrests are 11.3 times greater than arrests for burglary and 29.6 times greater than arrests for robbery. In comparison, males are arrested for larceny 1.3 times more often

than they are arrested for aggravated assault, 1.7 times more often than for burglary, and 4.9 times more often than for robbery (Uniform Crime Reports, 1992).

Thus, when the frequency of arrests for larceny-theft are compared to other index crimes, it becomes apparent that much of the convergence in sex ratios is disproportionately explained by this offense category (Uniform Crime Reports, 1992). Additionally, the disproportionate number of female arrests for larceny in comparison to burglary and robbery, which have traditionally been more frequently committed by males, does not suggest that female crime is becoming more "masculinized" in type as predicted by Adler (1975).

Therefore, while it is apparent from an examination of arrest rates that the extent of female crime is increasing, there is little evidence to support the position that female criminal expression is changing or becoming more serious. When arrests are examined by percent distribution within sex cohorts (Table 4), it appears as though the profile of the typical female offender has not appreciably changed over the past 20 years.

Violent Crime Arrests Within Sex Cohorts. Table 4 reveals that violent crime arrests for females have remained relatively stable, increasing less than 1% since 1972. In contrast, violent crime arrests for males show a gradual but steady rise, increasing from 4.5% to 5.8%. These arrest rates do not suggest that female crime is becoming appreciably more violent over time.

Property Crime Arrests Within Sex Cohorts. Much of the dramatic rise in female arrests for property crime that Simon (1981:25) observed occurring between 1953 and 1972 appears to have stabilized in the past 20 years. Simon reported that in 1953, 5.6% of

all females arrested were arrested for property crime, but by 1972, this had quadrupled to 22.3%. However, as Table 4 shows, the percentage of female arrests for property crime peaked to a high of 26.3% in 1975 and has been continually decreasing since then to a low of 20.8% in 1992. Male arrests reflect a similar pattern of rising from 14.9% in 1972 to 17.4% in 1974 and then gradually returning to 14.2% in 1992. Much of the increase in the 1970's is most likely attributable to the overall rise in crime associated with the post-World War II baby boom generation reaching the high crime-prone years. Although females comprise one-fourth of total property crime arrests, when examined in terms of the distribution of all female arrests, very little change in the percent of females arrested for property crime is revealed for the past 20 years.

A closer examination of female property crime arrests shows that nearly one-fourth of these arrests are explained by the combined offenses of larceny-theft and fraud. Arrests for these offenses have risen slightly for males but, overall, have remained relatively stable. Female arrests for larceny and fraud, on the other hand, have risen disproportionately and reveal greater overall fluctuations over time. Larceny arrests peaked in the mid-1970's and have been gradually declining since then. However, larceny still comprises the largest arrest offense category for females who are twice as likely to be arrested for larceny as males.

In comparison to larceny, the greatest change in property crime arrests seems to be in arrests for fraud. In 1972, 2.7% of females arrested were arrested for fraud and by 1992 this had increased to 6.5%. Fraud is officially defined as (Crimes in New Hampshire, 1992:58): "Fraudulent conversion and obtaining money or property by false

Table 4. Females and Males Arrested for Selected Crime Categories as Percentages of All Arrests in Their Respective Sex Cohorts, 1972-1992

Year	<u>Violent</u>		<u>Property</u>		<u>Larceny-Theft</u>		<u>Fraud</u>		<u>Embezzlement</u>	
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male
1972	2.8	4.5	21.3	14.9	19.1	8.0	2.7	1.1	0.2	0.1
1973	3.0	4.7	22.8	15.5	20.4	8.0	2.7	1.1	0.1	0.1
1974	3.0	5.1	25.1	17.9	22.5	9.8	3.0	1.2	0.2	0.1
1975	3.0	4.9	26.3	17.7	23.7	9.8	4.0	1.4	0.2	0.1
1976	2.9	4.5	25.7	16.9	23.4	9.6	4.8	1.5	0.2	0.1
1977	2.8	4.6	24.7	16.3	22.1	9.1	5.3	1.8	0.1	0.1
1978	2.9	4.9	25	16.2	22.2	9.0	5.9	1.9	0.1	0.1
1979	3.0	4.9	25.2	16.9	22.2	9.6	6.6	2.0	0.1	0.1
1980	2.9	4.9	24	16.9	21.2	9.8	7.1	1.9	0.1	0.1
1981	2.8	4.8	23.6	16.6	21.0	9.8	6.8	1.9	0.1	0.1
1982	2.8	4.7	23.1	15.8	20.6	9.6	6.5	1.9	0.1	0.1
1983	2.8	4.6	22.6	15.4	20.2	9.6	6.2	1.8	0.1	0.1
1984	2.7	4.6	22.8	15	20.5	9.5	5.5	1.6	0.2	0.1
1985	2.6	4.5	22.7	15.1	20.4	9.6	6.8	1.9	0.2	0.1
1986	2.8	4.8	22.5	15.1	20.1	9.5	6.8	1.9	0.2	0.1
1987	2.7	4.7	22.8	15.3	20.4	9.7	6.4	1.8	0.2	0.1
1988	2.9	4.9	22.1	15.1	19.6	9.7	6.5	1.7	0.2	0.1
1989	3.0	5.2	21.3	14.9	18.7	9.5	6.5	1.7	0.2	0.1
1990	3.1	5.4	21.6	14.4	19.2	9.2	6.0	1.7	0.2	0.1
1991	3.2	5.6	21.7	14.7	19.3	9.5	6.2	1.9	0.2	0.1
1992	3.5	5.8	20.8	14.2	18.4	9.1	6.5	2.1	0.2	0.1

Source: Uniform Crime Reports, 1972-1992

pretenses. Includes bad checks, confidence games, etc., except forgeries and counterfeiting." The nature of this offense provides support for those scholars

(Steffensmeier, 1978; Giordano, et.al., 1981; Feinman, 1986) who view female property crime as petty theft that is more reflective of economic marginalization than of economic prosperity. Additionally, Table 4 shows that arrests for embezzlement, which Simon predicted would rise in response to increased opportunity for females to commit white collar crime, has remained unchanged.

One last indication that the nature of female crime is not changing is found by rank-ordering the 10 offenses for which adult women are most frequently arrested. As Table 5 shows, these offenses have remained the same for the past 20 years, only the ordinal position has varied. Consistent with Feinman's (1986:22-24) observation of female arrest offenses in 1960, only two of these offenses, larceny-theft and aggravated assault, are index crimes. Although assault arrests increased in 1992, this was primarily due to a disproportionate rise in simple assaults.

In conclusion, an analysis of female arrest statistics over time suggests that the extent of female crime is increasing but that the profile of the typical female offender has not appreciably changed. Overall, arrest rates are rising for both males and females. Although the gender gap is gradually narrowing, for some offenses more rapidly than others, females still comprise a very small number of total arrests. In 1992, there were 1,364,449 adult males arrested for index crimes in comparison to 395,265 adult females (Uniform Crime Reports, 1992). This analysis of arrest data does not find empirical support for the thesis that female crime has become more "masculinized" in either magnitude or type. Rather, it suggests that the nature of female crime has remained fairly consistent over time. The question that, therefore, arises is whether rising arrests rates

Table 5. Rank Order Offenses for Which Adult Females Are Most Frequently Arrested, 1972-92

1972			1992		
Rank	Offense	% of All Female Arrests	Rank	Offense	% of All Female Arrests
1	Larceny-Theft	20.2	1	All Other	22.4
2	Drunkenness	9.8	2	Larceny-Theft	18.4
3	Disorderly Conduct	8.5	3	D.U.I.	8.1
4	Narcotic Laws	6	4	Other Assaults	6.9
5	Other Assaults	4.1	5	Drug Laws	6.7
6	D.U.I.	3.8	6	Fraud	6.5
7	Prostitution	3.4	7	Disorderly Conduct	5.5
8	Liquor Laws	2.7	8	Liquor Laws	3.8
9	Embezzlement/ Fraud	2.4	9	Drunkenness	3.2
10	Aggravated Assault	2	10	Aggravated Assault	2.9

Source: Uniform Crime Reports, 1972 and 1992

reflect an increased volume of female crime, more equitable treatment of female offenders by law enforcement officials, or both. Unfortunately, the extant research does not permit a definitive answer to this query. However, in light of the evidence that is available, two possible explanations for rising female arrests may be suggested.

One is that, as seen, arrest rates are a measure of both criminal behavior and the response of police to that behavior. Changes in reporting practices, law enforcement practices and technology, and changes in the way police respond to offenders may explain rising arrest rates.

As the female role in society changes, and as women demand equal treatment with



men, it is reasonable to assume that police perception of the potential of women to commit crimes will also change. If women are more likely to be suspected of criminal activity, they will come under more rigorous police investigation. Combined with this cognitive change is the fact that police are becoming increasingly more bureaucratized and professionalized. Researchers have observed that as police organizations become more formalized and legalistic, discretion is reduced and arrests increase (Wilson, 1968). It is reasonable to expect, therefore, that if police adopt a more legalistic response to criminal behavior, discretion will decrease toward women, as well as toward men, bringing more women into the system (Smith, 1984). It still remains to be established through research how much of the increase in female arrests reflects behavioral changes in women and how much of it reflects behavioral changes in police.

The second explanation for rising female arrests draws upon the understanding that crime cannot be examined in a vacuum. Crime statistics serve as a barometer of official response to deviant behavior, however, they also serve as a barometer of social changes affecting criminal behavior. Thus, changes in arrest rates can also be interpreted as indicators of more pervasive changes that are occurring in society. As a result, criminality and the official response to it, like any other social behavior, must be examined in the context of broader social, political, economic, and historical events.

As the economic situation of women worsens due to increased drug use, rising divorce, teenage and unwed pregnancies, increased child care responsibilities, and limited opportunity for economic advancement, it is reasonable to expect the motivation toward crime to increase (Chapman, 1980:88; Box, 1984:4-11; Zopf, 1989:13-14; Goldberg and

Kremen, 1990:1-6).

Therefore, it is questionable, once interpreted within the broader context of social change and changes in the criminal justice system, that female crime is changing as a result of increased occupational opportunities. The available evidence does not support the position that female liberation has changed the motivation of female offenders, resulting in a convergence of criminal roles (Steffensmeier, 1978; Box and Hale, 1984; Feinman, 1986). Changes in female criminality are more meaningfully understood when linked to broader social changes that include increased economic need, increased drug dependency, and changes in official response to female behavior. The effects of the women's movement have been subtle and, probably, more relevant to understanding how the justice system processes female offenders than to etiological explanations of female crime. As more women are being brought into and detained in the justice system through increased incarceration, issues surrounding gender equality will become more focal.

Dissatisfaction with the liberation hypothesis, and concern that the focus on the women's movement as the cause of female crime would divert criminological theory and research away from locating crime within a gendered social order, has served as a catalyst to the formation of a more unified feminist framework. Although a feminist critique of the criminology of female offenders predates the work of Simon and Adler, its existence was isolated and marginal. While it still remains outside the mainstream, the different levels of feminist thinking--liberal, socialist, and radical--are beginning to unify in developing a common voice (Simpson, 1989:609).

By locating the study of crime in political economy, feminist criminology roots

crime causation within inequitable social relations and the ways in which power, status, and authority are both hierarchical and gendered. Social and economic inequality and oppression are viewed as being reproduced in a legal, judicial, and correctional system that extends the historical authority of the family over the lives of women while simultaneously failing to protect women from physical and economic victimization and exploitation (Moyer, 1985:9-15).

As a result of this emphasis, feminist criminology has shifted the focus of theory and research from etiological questions to an examination of the treatment of women in the justice system and gender differences in criminal processing. If extant research is correct in its assertion that the nature of female crime remains essentially petty and non-violent (Steffensmeier, 1978), and that the female criminal role is still essentially one of accessory or accomplice (Ward, Jackson, and Ward, 1980) this shift in focus seems appropriate and necessary.

The next section will examine the effect of gender on the processing of offenders in the criminal justice system. It will also explore the relationship between changes in the structural position of women in society and changing mechanisms of social control in order to understand why, in the absence of the existence of a new, "liberated" female offender, the involvement of women in the justice process is increasing so dramatically.

#### The Influence of Gender on the Processing of Offenders in the Criminal Justice System

The deficiencies of theoretical explanations of female crime are most apparent in the early research examining the treatment of women in the justice system. The lack of clearly defined propositions resulted in research findings that were detached from a

theoretical foundation. This led to weak explanations for the gender differences that research was discovering, and nearly a decade of research conducted in search of a theory. Thus, despite the proliferation of research that exists on the influence of gender on criminal processing, little agreement regarding this relationship has emerged from the literature. The question of whether women receive preferential, punitive, or equal treatment to men in arrest, court processing, and sentencing has been met with inconsistent and often contradictory results (Simon, 1975; Rafter and Stanko, 1982:11; Parisi, 1982:206-210; Wilbanks, 1986:517).

Although some studies found women receiving either equal (Wilbanks, 1986:518) or more punitive treatment to that of men (Chesney-Lind, 1987), most research found women to be treated more leniently by police, prosecutors, and judges (Pollak, 1950; Nagel and Weitzman, 1971; Simon, 1975; Moulds, 1978; Parisi, 1982:210-214; Kruttschnitt, 1984; Johnston, Kennedy, and Shulman, 1987).

The explanation that was provided for this preferential treatment was that the same paternalism that defined gender relations in the broader society and defined women as physically and psychologically inferior and dependent was institutionalized in the operations of the justice system. Leniency toward women resulted from the desire of lawmakers and justice officials to protect women through the passage of gender-specific legislation, and differential processing decisions. Traditional attitudes and beliefs about the nature of women being less criminal, more moralistic, less dangerous, and more reformable when they did deviate combined with practical concerns for the social and economic impact of incarcerating women resulted in chivalrous treatment (Simon, 1975;

Steffensmeier, 1980; Daly, 1986).

While generally thought of in benevolent terms as protecting women through more lenient treatment, some research revealed a darker side to paternalism. Thinking of women in paternalistic, fatherly terms justifies informal rather than legalistic treatment within the justice system. This means less adherence to constitutional rights of due process and fewer procedural safeguards. Formal and legalistic procedures that were established to protect citizens from the arbitrary and unregulated use of power by the government are considered unnecessary when the intent of the justice system is to dispose cases in the best interest of the accused. This is best exemplified in the creation of a juvenile justice system which was based on a paternalistic rather than a legalistic model and which defined the relationship of the child to the state as governed by *parens patriae* (Mennel, 1973:14). The parallels between the perception and treatment of women in the justice system and that of juveniles have been unmistakable drawn (Chesney-Lind, 1987).

The paternalism of the juvenile justice system and the lack of precise legal criteria to govern the discretion of the police and the courts resulted in juveniles being subjected to more frequent and longer custodial care than would have been possible with an adult offender. Special statutory provisions that defined certain behavior as illegal only because of the age of the person, status offenses, put all juveniles at risk for police and court intervention. This risk was disproportionately felt by female juveniles who were more likely to be arrested, detained, and incarcerated for status offenses than were males despite the fact that self-report studies did not reveal a gender gap in the actual behavior of juveniles encompassed by this offense category (Datesman and Scarpitti, 1980; Chesney-

Lind, 1987:118).

The paternalism in juvenile justice that resulted in differential treatment of female status offenders, characterized the treatment of adult female offenders as well through the enactment of sentencing statutes that allowed women to be incarcerated longer than men who were convicted of the same or similar offenses (Temen, 1973:355).

From 1869-1969, thirteen states provided indeterminate sentencing statutes that were applicable only to women and were often mandatory, even though judges could utilize discretion in sentencing males. These acts were derived from the cultural belief that women had greater rehabilitative potential than men. They were also seen as being protective and therapeutic (Armstrong, 1977:110).

Temen (1973:368-369) found that women sentenced under separate, gender-based indeterminate sentencing statutes, were theoretically eligible for release sooner than men but often served longer sentences than men who committed similar offenses.

These statutes were eventually overturned, but not before numerous challenges based on their violation of women's rights to fair and equal treatment under law had initially failed. In a series of cases, various courts upheld these laws on the basis that the indeterminate sentence, as applied to women, was justified and reasonable due to its intent to treat not punish female offenders (Temen, 1973:363-364). Essentially the courts were using a "rational basis" argument, arguing that a rational justification existed for differential treatment of different "classes" of offenders when "the class exhibits characteristics that justify different treatment." Women constituted such a class, "based on the physiological and psychological make-up of women, the type of crime committed

by women, their relationship to the criminal world, their roles in society, their unique vocational skills and pursuits, and their reaction as a class to imprisonment, as well as the number and type of women who are sentenced to imprisonment rather than given suspended sentences" (Armstrong, 1977:111-112).

Although no longer subjecting women to such statutory protectionism, paternalism could still result in more punitive treatment of women who failed to conform to traditional sex-role stereotypes of respectable female behavior. Years after theoreticians had abandoned the distinction of the female offender as 'abnormal' either biologically by being overly masculinized (Lombroso, 1920) or psycho-socially by failing to accept and conform to her natural, 'feminine' role (Thomas, 1923; Freud, 1933), justice personnel were basing processing decisions on this cultural image of the female offender (Rafter and Stanko, 1982).

Researchers expressed concern that women who commit more masculine crimes or whose race or social status caused them to be perceived as less "feminine" would not only fail to receive more lenient treatment but may also be more severely penalized (Rafter and Stanko, 1982:5-7; Feinman, 1986:15-32).

Gruhl, Welch, and Spohn (1984:461-463) found that the leniency most women experience in the courts varies with race. Black and white women are less likely to be prosecuted or incarcerated than black and white men; and, Hispanic women are prosecuted at the same rate as Hispanic men but less likely to be incarcerated. However, when race and gender are controlled, white women are more likely than black or Hispanic women to be prosecuted and incarcerated. They attribute this difference less to

paternalism than to differences in family responsibilities between women of different races and practical concerns of judges for child custody.

In a later study, using a different dataset, they (Spohn, Welch, and Gruhl, 1985:181-183) again found that leniency varied with race. Black women are incarcerated less often than black men but as often as white men. They did not interpret this differential treatment as reflecting leniency toward black women but, rather, as reflecting discrimination against black men.

In a third study, they (Spohn, Gruhl, and Welch, 1987) found that white, black, and Hispanic females are more likely than all males to have their cases rejected for prosecution initially and dismissed at a later time.

Research by Daly (1989:158-160), on the other hand, did not reveal any racial or ethnic differences in the treatment of women on the basis of these characteristics alone. Her research did reveal some increased leniency toward black women which she attributed to differences in family responsibilities as opposed to race. However, Daly cautioned that statistical weaknesses could have caused this difference.

In addition to increasing the potential for women of devalued social status to receive less preferential or even punitive treatment, paternalism could be disadvantageous in other ways. When legal protections like equal access to legal representation, plea negotiations, and jury trials, are less available to women under the guise of protectionism, all women are at increased risk for discretionary and potentially more punitive treatment.

Steffensmeier (1980:356-357) has observed that paternalism is not an "advantage" in that it works against women as often as it does for them by restricting social, economic,



and political opportunities, and exposing women to higher levels of social control. He states: "From this perspective, benevolence and leniency constitute a two-edged sword. Putting women 'on a pedestal' helps keep them 'in their place'."

The relationship between gender and justice decisions is not easy to decipher. Inconsistent findings exist both between and within studies. Gender effects vary in direction, sometimes favoring women with more leniency, other times resulting in harsher treatment (Chesney-Lind, 1987:129). The fact that gender effects vary at different stages of processing and as different controls are introduced makes it difficult for conclusive findings to be obtained.

As a further complication, criminal justice has been in transition since the mid-1960's. Rising crime rates and the "war on drugs" focused government attention and funding on increasing the productivity, efficiency, and operations of the justice system (Inciardi, 1993:3-32). As was previously discussed, decision-making in the criminal justice system is affected by social change and changes in the justice system. This time period was characterized by changes in both the justice system and the wider society. Furthermore, it was during this unstable time that researchers began to examine the effect of gender on the justice process. It is not surprising, therefore, that the literature that has been produced is often ambiguous and conflicting (Moyer, 1985; Boritch, 1992).

Scholars have struggled to understand the conditions under which gender affects decision-making in the justice system. Some have predicted that as female criminality approaches that of males in nature and extent, sanctions will converge as well (Kruttschnitt & Green, 1984:546). Other researchers have questioned whether

paternalism provides an adequate explanation of gender differences in the justice process and have looked to explain differential treatment as due to economic dependency and lack of respectability (Kruttschnitt, 1984; Kruttschnitt and Green, 1984) or family responsibilities (Daly, 1989). Still others (Albonetti, 1986) have looked at the organizational structure of the courts for an explanation, and have tried to determine whether gender differences are due to gender alone or are a consequence of the social and economic roles and statuses associated with gender

Research models have become exceedingly complex in the number of variables and processes they seek to manipulate and control. As a result, it is difficult to review this literature without becoming ensnared in an analysis that is more detailed than necessary for the purpose of this study. In an effort to effectively manage the complexity of this research, findings on the treatment of women in the justice system are summarized for each sequential stage of processing.

#### Women and the Police

Research on police response to female offenders has been less extensive than that which has focused on the courts yet no less contradictory. Some research has found preferential treatment (Visher, 1983:15-23), some harsher treatment (Ghali and Chesney-Lind, 1986), and still other no gender differences in decision-making (Moyer and White, 1981:375; Moyer, 1992:77).

Visher (1983:23) found that police respond preferentially to women on the basis of demeanor. Older, white women who are deferential in their manner toward police are treated with leniency that is not extended to women whose behavior is hostile. This

leniency, however, is not extended to black women.

Moyer and White (1981:375) presented police with a series of scenarios and a questionnaire that measured discretion. Based on police reports of how they would behave, as opposed to direct observation of police behavior, they found that neither gender nor race alone predicted police decisions. The primary determinants of police discretion were offense and demeanor, and these determinants affected police decisions equally for male and female subjects.

Ghali and Chesney-Lind (1987) used arrest data to evaluate police decision-making after arrest. While their research does not address how gender affects the decision to arrest, it does reveal that once an arrest is made women receive harsher treatment at the police level of processing than at other stages. After controlling for age, employment, marital status, race, type of crime, and prior record, they found arrested females were less likely to be released during investigation and more likely to be referred for prosecution than arrested males. They did not know whether this was due to differential treatment based on gender bias or whether cases involving males were being deferred longer while more evidence was gathered.

#### Women and the Courts

A considerable amount of research has examined the effect of gender on court processing. However, the results have been inconsistent both between and within studies. What is evident is that the effect of gender on court decisions varies in existence and magnitude at different stages of the court process, and it varies in accordance with legal and extra-legal factors (Wilbanks, 1986:528). Legal determinants include offense type and

severity, the effect of earlier processing decisions on subsequent decisions, the use of weapons or violence and any resultant injury, prior record, quality of evidence, and statutory requirements. Extra-legal determinants are demographic attributes of offenders and victims, the victim-offender relationship, visibility of offense, public attitudes, and organizational objectives of justice officials.

Decision to Prosecute, Reject, or Dismiss. Ghali and Chesney-Lind (1987) found a high correlation between police decision to prosecute and prosecutorial decision to move forward on the prosecution (99.1% of all cases referred by police were brought forward for prosecution). They did not find any evidence that gender affected that decision.

Spohn, Gruhl, and Welch (1987) were interested in the effects of both gender and ethnicity on prosecutorial decision-making. Their examination of the reasons given by prosecutors for rejecting a case for prosecution or dismissing a case once prosecution has been initiated found little variation in justifications for screening cases between ethnic groups. Although blacks and Hispanics were less likely to be rejected initially, ethnic differences disappeared in later decisions to dismiss. Gender effects were found across racial and ethnic categories in that all females received more lenient treatment than males. However, black and Hispanic females were more likely to be prosecuted than were white females.

An earlier study by Gruhl, Welch and Spohn (1984), similarly found that, although gender effects are reduced once controls for offense severity, prior record, victim injury, employment, and type of attorney are introduced, dismissal rates are still higher for

females.

Albonetti (1986:639-640) found that prosecutorial discretion is influenced by a desire to maximize career advancement by screening cases that are unlikely to be successfully prosecuted. Thus, prosecutors are more likely to dismiss cases with uncertain outcomes. Cases with an increased probability of continued prosecution are those with physical evidence, those in which the victim and offender are unrelated, those which have an offender with a prior record, and cases where the offender is arrested at the scene of the crime. When the influence of these case characteristics on prosecutorial discretion are controlled, only gender has a statistically significant effect on continued prosecution. Prosecutors were more likely to nolle prosequi (refuse to prosecute) cases involving females. No relationship was found between case characteristics and type of offense providing further support for her conclusion that prosecutors treat females more leniently because of gender bias not because gender is correlated with other factors that produce higher dismissals.

Pretrial Release. Some studies (Nagel and Weitzman, 1971; Kruttschnitt and Green, 1984; Kruttschnitt, 1984), found that women were more likely than men to be released pretrial either on bail or on own recognizance (ROR).

Kruttschnitt and Green (1984:541-551) analyzed conviction data in Minneapolis between 1965 and 1980. The effect of gender on pretrial release were unevenly distributed throughout this period. However, for 11 out of 16 years women were more likely than men to be released pretrial. Gender effects did not appear to affect pretrial release when defendants were poor risks for failing to appear at subsequent proceedings,

dangerous, or economically disadvantaged. They also found that pretrial decisions affected sentencing decisions and caution that what appears to be a gender effect in sentencing may be a "processual effect" caused by earlier decision-making.

Pretrial release status appears to be an important variable in understanding gender effects on plea decisions and on sentencing. Its influence on subsequent decision-making varies, however, with whether release was obtained through posting cash bail or through personal recognizance.

Albonetti (1986:840) found that defendants who obtain release pretrial through cash bail are less likely to be screened out of the system following indictment. She states (1986:840) that "the bail decision itself contributes to the probability that a defendant will be criminalized." This finding is supported by Daly (1989:148) who qualifies Kruttschnitts and Green's view of pretrial release as mitigating sentencing because it occurs first in the process. She interprets the pretrial decision as "anticipatory" of sentencing decisions since the same variable predict both.

This is an important issue to be considered in research examining gender and court processing. If pretrial release decisions are based on the same criteria as decisions to continue prosecution and sentencing its influence must be controlled. Very little research has considered the question of whether women are more likely to be released pretrial and how different criteria for release may affect sentencing. This issue further exemplifies the complexity of this type of research and the caution that must be used in interpreting research findings.

Plea Negotiation. The degree to which gender affects the plea that is entered and

the bargaining process has been debated in the literature. Johnston, Kennedy, and Shuman (1987) found women were more likely to plead *nolo contendere* and plea to a reduced charge resulting in more favorable treatment during plea negotiations. In contrast, Gruhl, Welch, and Spohn (1984) did not find any gender effects in guilty pleas.

Contradicting both of these studies, Figueira-McDonough (1985) found that females are less likely to engage in plea negotiations. She did not find any gender differences in not guilty pleas but found that men plead guilty to reduced charges more often than women. Furthermore, for the same offense, men who plead guilty to the original charge are treated more leniently in sentencing than women who do so.

Adams (1986) reworked Figueira-McDonough's data and came to a different interpretation. He found that by disaggregating misdemeanors and felonies, male and female defendants were equally likely to have the charges against them reduced. Among defendants whose charges were reduced, women were treated more leniently in sentencing. He concluded that when prosecutors are more stringent by failing to reduce charges for females, judges show increased leniency with lighter sentences.

Ghali and Chesney-Lind (1986) found that gender effects varied with court level. At the district court level, which has jurisdiction over misdemeanors, females are more likely than males to plead guilty. At the superior court level, which has felony jurisdiction, gender did not influence the probability of a guilty plea.

Conviction. Research suggests that gender effects are most evident before and after trial. Discretion appears to be lowest at the trial stage, probably as a result of the high degree of formality that governs this stage. Therefore, it is not surprising that, in

general, researchers have not found gender bias in conviction (Simon, 1975:57-67; Gruhl, Welch, and Spohn, 1984; Ghali and Chesney-Lind, 1986:167).

Sentencing. The effect of gender on sentencing has probably received the greatest scrutiny by researchers. Most research finds men more likely to be incarcerated, and women more likely to receive either probation or suspended sentences (Nagel and Weitzman, 1971; Gruhl, Welch, and Spohn, 1984; Spohn, Welch, and Gruhl, 1985; Adams, 1986; Ghali-Chesney-Lind, 1986; Johnston, Kennedy, Shuman, 1987; Daly, 1989).

Ghali and Chesney-Lind (1986) found variation in court levels. Sentencing was not affected by gender at the district court level but women were more likely to receive probation than men with the same attributes at the superior court level.

Kruttschnitt and Green (1984) found an inconsistent but nonetheless overall pattern of leniency toward women in sentencing, although they attribute this to more leniency in pretrial release which they found correlated with reduced incarcerative sentencing.

Do these findings mean that women receive more lenient treatment than men? The answer appears to be yes, but not consistently. The nature of leniency appears to vary with level and stage of processing, offender and offense characteristics, and the social context within which the justice system operates (Wilbanks, 1986:528; Chesney-Lind, 1987:129).

Research suggests that gender effects are strongest in the pre and post trial stages of the justice process (Kruttschnitt and Green, 1984; Wilbanks, 1986:528). These are the



stages where the greatest discretion is employed so it is to be expected that extra-legal factors will operate at their strongest levels in screening decisions and decisions regarding pretrial release and sentencing. Although women are more likely to receive lenient treatment at these stages of processing, this will vary in accordance with offense, offender, and victim characteristics (Kruttschnitt, 1982:228).

Gender differences in the likelihood and severity of sanction are reduced or completely disappear when offenses are more serious, when there is a greater degree of harm or injury that results from the offense, when the victim is a stranger, and when the offender has a prior record of arrest and conviction. Kruttschnitt (1980:258-261) has found that prior record is an important predictor of sentencing. Interviews with judges revealed that sentencing was based on prior record rather than social characteristics of offenders.

Other research has found that leniency varies with the economic and social status of defendants. Kruttschnitt & Green (1984) found that leniency was greater when there was greater economic dependency. Daly (1989), on the other hand, found that gender was less important than family responsibility in predicting leniency--defendants who had greater responsibility for the care of children received more lenient treatment. Judges were less concerned with economic care than with nurturing and child-rearing responsibilities. This suggests that judicial attitudes are influenced by the social cost of removing care-givers from the home. To the degree that gender is correlated with greater family responsibilities as care-givers, females will receive more lenient treatment. Daly has qualified paternalism as being extended toward children of defendants, not defendants

themselves (Simon and Landis, 1991:63).

Chesney-Lind (1987:131) has also observed that judges evaluate defendants differentially on the basis of gender. Her research found legal variables are more important in assessing males and non-legal factors are more influential in the assessment of females. When non-legal criteria are used for both sexes, judges still evaluate men and women differently. Employment status is a more important determinant of sentencing for males and family status for females, although this finding was not supported by subsequent research conducted by Daly (1989).

Finally, judicial attitudes also appear to be influenced by philosophical and practical considerations that could produce more lenient treatment of women. In addition to the practical concerns identified by Daly (1989) in judicial assessment of the social cost of incarcerating women with family responsibilities, practical concerns may also include gender differences in economic costs. Steffensmeier (1980:353) has speculated that judges may be more resistant to incarcerating women out of concern over limited institutional availability and limited rehabilitative programs in the institutions that are available. If there is less institutional space available for women and if the quality of programs and conditions in female facilities are inferior to those found in male facilities, judges may feel it is less cost effective to incarcerate women as well as less philosophically justifiable.

After assessing the literature on gender-based sanctioning, Chesney-Lind (1987:133) concluded that women are not treated more leniently when the issue of proportionality is considered. Given the non-serious nature of female crime, the extent to

which non-legal criteria influence decision-making, and the history of physical and sexual abuse that is often causally linked to female criminality, she believes women actually receive harsher treatment than men.

Apparently the causes of gender-based leniency, when it does occur, are more complex than the early literature and the paternalism thesis would suggest (Steffensmeier, 1980; Kruttschnitt, 1982; Chesney-Lind, 1987; Daly, 1989).

#### Methodological Limitations on Research Findings

Many of the inconsistencies in research findings have been explained as attributable to the use of non-comparable data comparing females to males; limited background data on female offenders which restricts the use of statistically rigorous controls on outcome measures; inadequate and inconsistent offense categorizations; and, an over-emphasis on sentencing outcomes without the use of adequate controls for the extensive decision-making that occurs prior to sentencing (Ghali and Chesney-Lind, 1986).

This last point is particularly relevant in interpreting studies on the justice process. The justice system is not a single, unified entity. It is a complex, interactive, dynamic process. Numerous factors influence decision-making and what is significant in its effect on decisions made at one stage may be less significant at another. In part, this occurs because the personnel are different, with different backgrounds, education, attitudes, responsibilities, and goals. But also because the objectives, mandates, statutory limitations and prerequisites, policies, responsibilities, and goals of each agency are separate, distinct, and often contradictory (Blumberg, 1979:7-8; Anderson and Newman, 1989:86-95).

The conceptual, philosophical, and legal models that guide one component of the

system are not those that govern another (Blumberg, 1979:291; Feeley, 1983:10; Smith, 1984:19-20). Police operations and policies are legally governed by constitutional and statutory restraints on behavior. However, politically and sociologically, their budgets, their relationship with the community, and the psycho-social dynamics that motivate officer behavior reflect a model that is more oriented toward the objectives of crime control. This does not mean that police are indifferent to the demands of due process, but that their priority is controlling crime. As a result, procedural objectives are adhered to to the extent that they facilitate, and don't obstruct, the accomplishment of this primary objective. Due process issues are instrumental in achieving the goal of making arrests that will hold up in court, but they are not valued as an end in themselves (Blumberg, 1979:67-79).

The courts are not indifferent to the need for crime control, but their existence is defined through procedure. Crime control demands must be balanced against preservation of individual rights as guaranteed by constitution and statute. The result is a fragmented and often conflicting "non-system" of justice (Feeley, 1983:11; Inciardi, 1993:156-157). It is not surprising that decisions made at different stages and by different agency officials will be contradictory and inconsistent. Given the nature of the justice system and the validity problems posed by official data that have already been discussed, it is clear to see that scholars studying women and crime have a challenging task.

The methodological limitations that researchers must address are further exacerbated by a narrow theoretical foundation that fails to adequately generate testable hypotheses and that insufficiently specifies the model. Paternalism and the "chivalry

hypothesis" provided the primary conceptual foundation that guided early research. More "quasi-theoretical" than theoretical, paternalism has been criticized as "developed out of thin air" rather than being empirically grounded in research examining how criminal justice decisions were made (Daly, 1989:137). The result has been inconsistent and conflicting research findings that are able to provide only partial support for the theory being tested (Moyer, 1985; Boritch, 1992).

#### Structural Determinants of the Treatment of Female Offenders in the Justice System

Dissatisfaction with the limited explanatory power of paternalism and an increasing awareness of the need for a broader theoretical framework led researchers to explore the influence of structural determinants of gender differences in the criminal justice process.

Kruttschnitt and Green (1984) examined whether judicial attitudes toward women, as measured by sanctioning decisions, were changing in response to changes in female criminality or in response to structural changes in sexually stratified social and economic roles. Using conviction data that covered 16 years, their sample was stratified by gender, offense, and year of conviction. The offenses--theft, forgery, and drug violations--and the year of conviction, 1965 through 1980, were chosen to obtain the greatest degree of gender convergence. Structural and cultural differences between the sexes, as well as several other theoretically relevant variables were controlled in their measurement of gender differences in pretrial release and incarceration.

They found that women who were economically dependent on others were treated more leniently than women who were economically independent; and, that leniency toward women, although more likely than toward men, was unevenly distributed across the time

period. Leniency in pretrial release was greater in the middle to late 1970's, when sex-ratio convergence was greater for each offense category, than in the 1960's when there was more disparity. Also, gender-based leniency was reduced when control variables were taken collectively; but, when taken individually the effects of each fluctuated from year to year.

Confused over why factors that influenced the court in one year, failed to influence it in another, Kruttschnitt and Green suggest that court decisions reflect short-term considerations of either judges or the public as opposed to more long-term trends. They observed that the time period of the late 1960's and early 1970's was one of great social unrest and change, considerable media coverage of the women's movement, and changing legislation intended to correct gender inequalities. In view of this, they questioned why inequity should reappear in the courts during this period and why economically independent women were treated less leniently than economically dependent women. Their explanation is that the court acts to reinforce control over traditional sex-role behavior by bringing women who are less traditional in sex-role behavior and, thus, under less informal control in society, under closer formal control. They conclude that judicial discretion responds to structural arrangements and changes in society.

Although Kruttschnitt and Green did not find female criminality affecting judicial attitudes or sanction, they express uncertainty over whether this will continue if female crime comes to be perceived as more dangerous and persistent than is currently the case. For this reason, they believe that assumptions of leniency toward women should be qualified since leniency varies with social and economic roles and the degree of informal

social control that constrains behavior.

Consistent with this observation, recent research (Boritch and Hagan, 1990; Feeley and Little, 1991; Boritch, 1992) has found female criminality and leniency toward women to be historically contingent and influenced by structural changes in formal and informal control mechanisms.

Feeley and Little's examination of Old Bailey records between 1687 and 1912, Boritch and Hagan's analysis of arrest records in Toronto from 1859 to 1955, and Boritch's study of jail records in Ontario from 1868 to 1920 challenge the view that female crime has always been marginal and low.

Each of these studies found that female involvement in the criminal process declined as the societies studied became modernized. They interpreted this decline as the result of social-structural changes in women's domestic and economic roles and changing mechanisms of social control that occurred in response to industrialization and urbanization.

Of these studies, Boritch's research is particularly relevant to facilitating an understanding of the structural forces that influence the creation and use of both formal and informal social control and of the ways in which structural change and mechanisms of control influence criminality. Her examination of jail records in Ontario during the Urban Reform Era (known as the Progressive Era in America) challenged the assumptions that women in the past were treated more leniently by justice officials and that current leniency is either an extension of the chivalry of the past or a reaction against it. Instead, she found that female offenders in the past were sanctioned more harshly than men. For the entire

study period, gender was found to be a significant determinant of incarceration. Women were more likely than men to be sentenced to prison and more likely to receive longer sentences. However, consistent with contemporary research in America, she found that gender differences in sentence severity varied across offender and offense attributes over time. Although men were more likely to be incarcerated for larceny than for public order offenses, women were equally likely to receive a prison sentence for both types of offenses. According to Boritch (1992:317), "judges appeared to adopt the attitude that the form a woman's criminality took was secondary to the fact that a woman appeared before the court on any charge."

Interestingly, she found significant changes in the treatment of women over time. Harsh treatment of women is more characteristic of the late 19th century. By the 20th century, a shift occurred and women were less likely than men to be imprisoned, although still more likely to receive longer sentences. Boritch explains this as the result of women being increasingly brought under informal control, through the development of a network of social service and community-based intervention programs, developed by Progressive reformers and directed toward women. Men, on the other hand, remained under the formal control of the justice system. The combined result was a reduction in overall female criminality and gender differences in court outcomes. Boritch (1992:318) notes that "this finding underscores the importance of controlling for the potentially variable influence of gender across different decision-making contexts before drawing generalizations about the nature and extent of gender-related disparities in sanction severity."



Gender, Social Control, and Court Processing

Boritch's research can be related to current understanding of gender, social control, and court outcomes in several ways:

The Myth of a Historical Leniency. Boritch's (1992) research suggests that the assumption that women received chivalrous treatment in the past is at least partially a myth. Instead, she views current sanctioning as a continuation of historical patterns of punitive treatment toward women who violate sex- role expectations.

There is some evidence of similar fluctuations in the treatment of female offenders that Boritch found in Canada having occurred in America during a comparable time period. Chapman (1980:21) observed that the female prison population in America was higher in 1828 and in 1923 than in 1980. Also, Massachusetts held 400 women in prison in the 1870's and only 112 in 1976. Freedman (1992:12-14) reports that during the Civil War, major cities like New York City, Buffalo, Boston, and Detroit experienced a considerable rise in female crime rates. Also, female convictions in New York courts began to rise after 1840; and, increased at a faster rate than male convictions between 1847 and 1860. As a result, the sex ratio in convictions dropped from 6 to 1 in 1840 to less than 2 to 1 in 1860. By the end of the century, however, the sex ratio began to again increase. Similarly, in New York and Massachusetts female convictions for property crime increased 10 times faster than male convictions. Additionally, female incarcerations increased by one-third during this period while male populations decreased by almost one-half. The offenses for which women were incarcerated consisted primarily of public order crimes and gender-specific statutes governing chastity and public decency. However,

crimes against the person also increased more than three-fold during the 1850's and 1860's for women. Freedman (1992:12-14) attributes this increase to stricter laws and law enforcement practices, particularly regarding abortion.

Economic Dependency, Family Status, and the Cultural Ideal of "Maternal Feminism." Contemporary research suggests that economic dependency and family status affect gender differences in court outcome. Daly's (1987; 1989) research found that judges were more lenient in sentencing parents who performed care-giving roles than parents whose role was that of providing economic support. Boritch's (1992) research suggests that the importance of these factors may also be historically contingent. She found no evidence that married women were treated more leniently than married men, in fact, marriage had a stronger mitigating effect on severity for men than it did for women. This discrepancy is most likely explained by a clearer understanding of how cultural differences in attitudes toward women, and structural differences in governmental entitlements affected judicial attitudes in court disposition.

According to Boritch (1992:319): "The marked absence of leniency toward women implies that whether married women are treated more leniently than married men by the courts is crucially influenced by prevailing considerations of social class, economic conditions, and levels of state supports for families."

That marriage did not mitigate female incarceration is probably reflective of structural differences in the importance of gendered economic and caretaking roles to family survival in the late nineteenth and early twentieth centuries. This period predates the growth of the welfare state, and governmental subsidies for families. Therefore,

removing the provider of economic support was of greater detriment to families than removing the care-giver. Furthermore, the importance of the maternal role of female defendants was diminished by class-based differences in the perception of motherhood.

According to Boritch, the culturally idealized view of "maternal feminism" that emerged during this era did not extend to the predominantly working class women who found themselves before the court--their lives were qualitatively different from the domesticity of middle class women. As a result, judges may not have perceived them as being central to the care of their children and families and, thus, may have been less reluctant to remove them from the home. It was not until many years later that a diffusion of middle-class and working class values brought greater convergence to family roles. Boritch (1992:319) observes: "During the Urban Reform Era, judges appeared to view women's criminality as *prima facie* evidence of their inadequacy as mothers and showed little hesitancy in removing them from their child-care role."

Institutional and Structural Changes. The same broad institutional and structural changes that Boritch describes as occurring in Canada were occurring in America in the late eighteenth and early nineteenth centuries (Degler, 1973:143-136). It is not unreasonable to assume that comparable structural changes in American society would have a similar impact on court processing. The creation of the juvenile court and corresponding extension of governmental control over children (Mennel, 1973:124-149), the widely held belief that cities and families were criminogenic (Mennel, 1973:145-157 and 178-195), and the development of criminological theories that explained female criminality as caused by biological inferiority or psychosocial failure to conform to the

feminine role (Klein, 1979), may have prejudiced judicial attitudes against the maternal fitness of married women before the courts and reduced judicial hesitancy to disrupt the families of these women (Kruttschnitt, 1980; 1982).

Social Control Theory. Contemporary research often utilizes a social control perspective to explain gender-based court outcomes (Davis and Stasz, 1990:215-243). This perspective emphasizes that gender differences in the type and intensity of social control mechanisms explains gender differences in criminality, both in terms of motivation and opportunity, as well as in criminal justice processing. Researchers (Kruttschnitt, 1989; Kruttschnitt, 1982; Kruttschnitt and Green, 1984) using this perspective have predicted that females will receive more leniency in the courts because they are subject to stronger informal controls .

An historical perspective is particularly appropriate for an analysis based on social control theory. Such a perspective provides an understanding of how social change affects mechanisms of social control at the broader institutional level, and the degree to which social control is spatially and temporarily contingent.

In order to understand variations in the treatment of women in the courts, it is important to consider the broad macro-level changes in social control over women in comparison to men that began during the Progressive Era and that continue to influence the treatment of women in the justice system today.

Boritch (1992) believes that the extension of middle-class values and definitions of femininity to working-class women through the development of informal community networks to control female deviance served to reduce female criminal activity and altered

judicial attitudes toward women. The effect of community-based programming was two-fold. First, judges were less reliant on institutional control because there were community alternatives available, especially for first-time and young female offenders. At the same time, older and repeat offenders were being incapacitated through imprisonment and longer sentences. The combined effect of increased diversion of the young and incapacitation of the older recidivist was to reduce female criminality. Support for this interpretation is offered in her research comparing male and female recidivism and incarceration. She found incarceration and recidivism did not change between time periods for males but dropped significantly for females in the early twentieth century.

According to Boritch, community programs targeting women brought female offenders under greater informal control while males remained under formal, legalistic control, resulting in reduced female criminality and sanction.

The Relationship Between Post-Industrial Change in Gender Roles, Social Control Mechanisms, and The Rise in Female Arrest and Incarceration. An analysis that draws upon the relationship between the structural role of women and the treatment of women in the Canadian criminal justice system during the Urban Reform Era may serve to broaden an understanding of rising female arrest and incarceration rates in contemporary American society. The fundamental changes in social organization that Boritch identified in Canada were not unique but rather were commonly experienced by other countries that were undergoing industrialization and urbanization. Therefore, a number of parallels can be drawn between the social and economic conditions of that period and those of today.

Changing Social and Economic Roles of Women. Women's social and economic

roles were changing then as they are changing now. Female crime and deviance at the turn of the twentieth century was blamed on greater social and economic freedom for women resulting from industrialization. A number of scholars ( Sachs, 1978; Zedner, 1991; Rafter, 1983; 1992a; Freedman, 1992; ; Boritch, 1992) have identified a link between the changing social and economic roles of women during this period and rising arrests, incarceration, and the expansion of both community-based and institutional control of women.

According to this analysis, middle class women were more economically dependent upon domestic relations than working class women; and, thus, were under closer informal social control that emphasized moral and social purity and "maternal feminism." Working class women, because of their participation in paid labor, were relatively less restricted by their domestic role and subject to less informal control. As a result, they were perceived as a threat to middle-class domestic values and moral standards. Concern over the greater social and sexual liberty available to working class women, and its consequences for the moral and physical health of society and future generations, led to the creation of a "cult of domesticity and feminization" that sought to regulate the sexual and social behavior of young working-class women (Feinman, 1986; Boritch, 1992).

The reformatory movement and the expansion of community programs that accompanied it have been seen as a mechanism for bringing female behavior, particularly sexual behavior, under increased formal and informal control. In addition to increasing formal control mechanisms through the creation of reformatories, Progressive reformers also ushered in an expanding network of informal control through the creation of social

service and community-based intervention programs. The net effect was that the lives of women were being regulated formally through the legal and criminal justice system, and informally through community programs (Rafter, 1992a:23-51; Freedman, 126).

This paradigm can inform an analysis of changing female criminality and criminalization in contemporary America society. Female crime and deviance is again rising and is again being attributed to the increased economic opportunity and freedom afforded women in a modern, industrialized society (Adler, 1975; Simon, 1975).

Rising Female Arrests. An examination of female arrest rates from the 1930's through the post-World War II years (see Table 3) shows that female crime more than doubled during the war years and then began to gradually decline in the years that followed not rising again to that level until the mid-1960's. It is not a coincidence that these years represent a period in which the structural position of women in America was changing. Women assumed expanded social and economic roles during the war as they worked in the war industry, served in the military, and took an active role in social and health care programs directed toward war relief (Degler, 1973:139-140). Following the war, although the number of women in the labor force stayed higher than it had been in pre-war years, most women were both forced and encouraged back into domestic roles through the loss of their jobs to the returning male veterans and through governmental incentives that encouraged and expanded middle-class family lifestyle. Government subsidies for education and housing led to an expansion of suburban tract housing and to increased economic affluence that allowed many families to live on one income rather than two. The net effect of these changes most likely contributed to the baby boom of the late

1940's and early 1950's which encouraged and allowed many women to remain in the home and out of the labor force, at least on a regular basis. In 1950, only 12% of mothers with children under the age of six were in the work force (Whitehurst, 1977:56).

It appears as though the greater participation of women in the public sphere which seemed to be occurring in the early decades of the twentieth century began to decline in post-war America. For example, in 1937 women comprised almost 40% of the college student population. This was far greater than that of other industrialized countries like Germany (10%), Sweden (17%), and Great Britain (22%). By 1953, while the proportion of women in college in modern European countries was rising, it had dropped in America to 35%. Furthermore, 15% of doctorate degrees in America were held by women in the 1920's, but by the early 1950's, only 10% were held by women (Degler, 1973:141). Similarly, in 1920, 30% of college professors and 3.2 % of dentists were women. By 1960 this had reduced to 6.8% and 2.1% respectively (Whitehurst, 1977:59).

As an idealized view of the typical family began to develop, a cult of domesticity was created that was reminiscent of that which existed a century earlier (Friedan, 1963; Feinman, 1986). The result was greater informal control over the lives of women, whose main purpose once again became the care of the household and the family. This control was disturbed, however, with the social unrest that developed in the 1960's and the reemergence of the Women's Movement. Demands for civil and equal rights combined with an ethos that challenged sexual and social normative standards. The heightened individualism and emphasis on personal fulfillment that characterized this ethos brought dramatic changes in the lives of women. Increased sexual freedom, more efficient birth



control, increased educational attainment, and increased labor market participation helped to liberate women from domestic roles and reduced the restraint of informal controls to a large degree (Degler, 1973:143-145). This did not come without a cost, however.

Divorce rates rose, occupational achievements and income remained limited, and female poverty increased (Box, 1987:43; Zopf, 1989:1; Goldberg and Kremen, 1990:1-6; Davis and Stasz, 1990:277-278; Beirne and Messerschmidt, 1991:551-552). With this also came rising arrests. As Table 3 has shown, female arrests increased from 9.6% of total arrests in 1950 to 14.6% in 1970.

Philosophical and Institutional Changes in the Criminal Justice System. At the same time, society began to react to increased demands for rights and increased normative freedom and individualism with demands for stronger institutional controls, particularly within the criminal justice system. The liberal philosophies of rehabilitation, non-interventionism, and reintegration that had led to a decarceration movement in the 1960's and 1970's and the expansion of community-based alternatives to institutions began to give way to a more conservative philosophy based on just deserts and accountability for behavior. For different motivating reasons, liberals and conservatives began to coalesce in their concern that rehabilitation was failing (Blumstein, 1989:15-18). The justice perspective emerged (Fogel, 1984) and with it incarceration began to rise (Rafter, 1992:178). The incarceration rate for all state and federal prisons and reformatories in 1970 was 98 prisoners per 100,000 resident population (Calahan, 1986:30). By 1990, the incarceration rate had almost tripled to an all-time high of 293 prisoners per 100,000 resident population (Vito and Holmes, 1994:35). Since the incarceration rate for

women had been fairly low (Pollock-Byrne, 1990:58; Freedman, 1992:11-12; Rafter, 1992a:77 and 196-197), the effect of increased institutional sentencing was particularly evident on female prison populations--which rose by 202% in comparison to a male population increase of 112% from 1980-1989, even though women still comprised only 6% of prison populations (Greenfield and Minor-Harper, 1991:1).

**Rising Female Incarceration.** Aside from the rising number of women incarcerated, the characteristics of female correctional populations are also changing.

Table 6. Offense Categories for Female and Male Prisoners, 1979-1991

Offense	<u>Female</u>				<u>Male</u>			
	% Female Prisoners			% Change	% Male Prisoners			% Change
	1979	1986	1991		1979	1986	1991	
Violent	49.0	41.0	32.0	-21.9	n/a	55.0	47.0	-14.5
Property	37.0	41.0	29.0	-29.3	n/a	31.0	25.0	-19.4
Drug	10.5	12.0	33.0	+175.0	n/a	08.0	21.0	+162.5
Possession	2.7	4.0	n/a	+48.0	n/a	n/a	n/a	--
Trafficking	7.1	7.3	n/a	+02.8	n/a	n/a	n/a	--
Public Order	2.9	5.0	6.0	+20.0	n/a	05.0	07.0	+40.0

Sources: Greenfield and Minor-Harper, 1991:2; Beck, et.al., 1993:16

As can be seen in Table 6, in 1979, almost half of all women in prison were incarcerated for a violent crime. Of the remaining half, over one-third were incarcerated for a property crime and only 11% were committed on drug offenses. In 1991, commitment offenses were evenly divided among violent, property, and drug offenses. Not only has the proportion of women incarcerated for violent crime decreased, but the use of incarceration

for drug offenders has risen significantly. At first glance this might suggest greater female involvement in more serious drug-related crimes like sales and trafficking. However, a closer look at Table 6 reveals that incarceration has only risen slightly for drug trafficking (2.8%). Most of the increase in prison commitments of women on drug charges is for possession (+48%).

In contrast, the shift in commitment offenses is less pronounced for male prisoners. Although commitments for violent and property crimes decreased, and drug commitments increased from 1986 to 1991, men are still more likely to be incarcerated for violent crimes than are women.

According to one ex-offender, women are not committing more crime but rather are being arrested more often, especially for drugs and welfare fraud. She observed that 75% of the ex-offenders she worked with had been incarcerated for drugs, and that before legislative changes in the drug laws had been enacted, those women would have been placed on probation or convicted on a reduced charge as a misdemeanor. She observed: "We are being prosecuted now for things that used to be dealt with by restitution or probation. Now there's jail" (Feinman, 1986:26). It may have been this notable change that prompted Chesney-Lind (1992:32) to observe that "the war on drugs has translated into a war on women."

### Conclusion

In this chapter, we have seen that despite an increase in female arrests, the evidence does not suggest that the nature of female crime is changing. Nonetheless, the use of incarceration for female offenders is becoming more frequent and less

discriminating with regard to offense severity. Incarceration is increasingly being used for offenses that were more likely to result in a non-institutional sentence a decade ago (Rafter, 1992a:254).

Increased reliance on incarceration leads to a spiraling growth in prison populations that creates a tautological justification for further reliance on institutional solutions to crime control (Johnson, 1992:198). As more women are sentenced to prisons rather than given intermediate sanctions, more prisons are needed. In the 1980's, 34 women's prisons and units were opened (Chesney-Lind, 1992:30). The demand for more prisons increases institutional availability, making prison a viable sentencing option for the courts.

Building and maintaining institutional facilities is expensive. It is reasonable to assume that correctional funds will be disproportionately absorbed by the more costly prison. For example, in New Hampshire in fiscal year 1991, only 10.3% of the correctional budget was allocated toward field services (probation and parole). In 1992, as prison populations increased, field services constituted an even smaller 9.8% of the annual budget (New Hampshire Department of Corrections Biennial Report, 1992-1993:5-6).

Nationally, in 1990, the United States spent \$25 billion on the correctional system with 85% of that amount allocated to operate the jails and prisons. It has been estimated that were prison and jail construction to continue to escalate in accordance with public and political demands, it would necessitate the allocation of one-third of all state revenues in operating and construction costs alone (Irwin and Austin, 1994:13 and 161). With fewer

and less effective community alternatives available, non-institutional sentences become less viable and desirable options to judges.

Institutional availability becomes an additional factor that influences the treatment of women in the justice system. Its influence on sentencing is particularly relevant when considered in conjunction with an increasingly bureaucratized organizational environment within criminal justice and an emergent equality ethos within the broader society that reinforces bureaucratic demands for impartiality and decision-making based on objective and legalistic criteria (Blumberg, 1979; Steffensmeier, 1980; Daly, 1990). Add to this formula a society that is demanding increased and longer incarceration of offenders (Irwin and Austin, 1994:5-8 and 159), and the result is a court structure that is pressured toward processing offenders in the most expedient, as opposed to the most judicious, manner. Under these conditions, all defendants, but women in particular, are at greater risk for more severe sanctions. Equal sentencing in the courts does not immediately translate into equal treatment within correctional facilities for men and women who are incarcerated. The historical legacy of women in the correctional system has been one of inequality and neglect (Pollock-Byrne, 1990:4-5; Freedman, 1992:20; Rafter, 1992a:3-4, and 196).

The next chapter will demonstrate that while the correctional treatment of women has been gradually improving over time, incarcerated women are still subjected to differential and inequitable treatment (Rafter, 1992a:195-197). Furthermore, demands for equal treatment within a correctional environment pose more practical and philosophical problems than such demands do for law enforcement or the courts. In order to understand

why this is so, the next chapter will examine the historical development of the prison as a mechanism of social control of women, the correctional needs of female prisoners, and the contemporary use of legal reform to alleviate the residual effects of this history of neglect and inequitable treatment on the current correctional treatment of women.

## CHAPTER III

### WOMEN IN CORRECTIONS AND THE USE OF LITIGATION TO ACHIEVE PENAL REFORM

#### Introduction

This chapter will provide an historical perspective on the penal treatment of women in order to explore the relationship between the historical development of the women's prison and correctional problems faced by female prisoners today. It will also examine the recent use and effectiveness of litigation by female inmates as a means of achieving correctional reform and addressing the correctional concerns of incarcerated women.

It will be shown that historically the correctional treatment of women, although often harsh, neglectful, and, at times, discriminatory (Burford and Shulman, 1992), was nonetheless not significantly distinct from that of men until the birth of the penitentiary in the nineteenth century (Rafter, 1992a:4; 1992b:17). At that time, women became isolated and forgotten due to the small number of women in prison, the limited economic productivity and profitability that could be derived from female inmate labor, and cultural beliefs about the incorrigibility of the female offender. The social activism of Progressive reformers challenged these beliefs and demonstrated that female prisoners could be reformed. They argued that the correctional needs of women, being distinct from those of men, necessitated the creation of a separate penal system for women. Through organized political efforts, progressive reformers, with the support of wardens who viewed female

inmates as disruptive to prison order, campaigned to remove female inmates from male prisons. Their efforts resulted in the birth of the reformatory movement which established separate and autonomous female institutions specifically designed to reform all but the most hardened and serious offenders (Freedman, 1992; Rafter, 1992). In so doing, however, this movement also helped to articulate and reinforce a cultural ideology of innate feminine domesticity that strengthened informal control over women who conformed to this ideal and extended greater formal control over women who deviated from it. Furthermore, by demonstrating that female offenders were capable of being reformed if provided with strict supervision and proper role modeling, the reformatory movement reinforced legal and institutionalized gender inequality (Rafter, 1992a:5).

Reformatories were established primarily for young female offenders whose behavior was more deviant than criminal and who had previously been held in local jails or handled through community programs. Since not all states built reformatories, and those that did did not use them for serious female offenders, many women were still being incarcerated in male prisons. As social conditions and correctional priorities began to change, the reformatory model declined. Reformatory populations were transferred back to county jails, and these institutions eventually became transformed into prisons for female felons. The result was an amalgamated penology that combined selective elements of the reformatory and custodial models into what has become the contemporary women's prison (Rafter, 1989).

Given this history, it is somewhat ironic that women's prisons today are characterized by many of the original problems that contributed to the reform efforts of



the late nineteenth and early twentieth centuries. Small female inmate populations and the persistence of gender stereotypes concerning female criminality have perpetuated the institutionalized neglect and isolation of female inmates (Rafter, 1992a:179-180). As in other spheres of social life, separate has not translated into equal, and women's prisons provide fewer services, programs, and opportunities for rehabilitation than do men's prisons (Arditi, 1973; Rafter, 1992a:195-197, 1992b:17-19).

Faced with conditions that are similar to those that stimulated initial reform efforts a century ago, yet wary that advocating the special needs of women will perpetuate gender discrimination, contemporary reformers are instead demanding that female prisoners receive equal treatment to male prisoners. In some cases, reformers (Fabian, 1979; Herbert, 1985) are even advocating a return to the use of integrated prisons out of concern that equity can never be achieved within a segregated correctional system.

Encouraged by the success of male prisoners to achieve penal reform through court litigation, women inmates have increasingly turned to the courts to seek recognition of their needs and rights and amelioration of their problems (Gibson, 1973:227; Rafter, 1992a:197). While male prisoners have most frequently filed litigation based on Eighth Amendment protections against cruel and unusual punishment and section 1983 of the Civil Rights Act of 1871 which prohibits state officials from denying inmates their constitutional rights (Turner, 1979:610), female prisoners have more commonly used the Equal Protection Clause of the Fourteenth Amendment as the legal basis for litigation (Fabian, 1980:179; Leonard, 1983:47). The use of this legal argument has been viewed by some scholars (Fabian, 1980:185), however, as a double-edged sword. On the one hand,

it has opened the door for female prisoner litigation, provided a much-needed forum for addressing the problems of female prisoners, and ushered in some change and reform (Leonard, 1983:55). On the other hand, an equal protection argument restricts the grounds of legal challenges to demands for parity with male inmates. As such, it not only accepts the legitimacy of the institutional model, but, at best, can only provide better prisons rather than better solutions to the problem of female crime and correction (Alpert, 1982:41; Leonard, 1983:55; Rafter, 1992a:202). At its worst, legal reform based on parity can reduce the overall quality of correctional programs and conditions for all prisoners by lowering all standards to the lowest acceptable level. Furthermore, it can result in a backlash of retaliatory treatment against incarcerated women (Fabian, 1980:185) or what has been referred to as "equality with a vengeance" (Rafter, 1992a:203).

Therefore, in addition to providing an historical perspective on the correctional treatment of women, this chapter examines the specific problems encountered by female inmates and the use of litigation based on parity to mitigate these problems. The dilemma of whether legal strategies should be based on demands for parity or consideration of special needs is also explored in conjunction with the question of whether extant legal theory is capable of providing correctional treatment for women that is appropriate, effective, just, and humane.

#### Historical Perspective on the Punishment and Social Control of Women

It is believed that the use and forms of punishment, as well as its philosophical justification, predates criminal law and organized society and is rooted in the most primal

forms of human existence (Newman, 1978:13-30; Burford and Shulman, 1992:10). As civilization evolved, punishment became more intentional, assuming teleological, and eventually religious and ritualistic characteristics that were inextricably linked to cultural and social development. Specific definitions of punishment may vary but, all seem to contain the following core elements: (1) it must inflict pain or unpleasant consequences upon those who violate a rule; (2) it must be purposive in that it is intentionally inflicted to achieve a recognizable objective; and (3) it must be administered by a socially recognized authority (Newman, 1978:7-11).

It is unclear from the literature on the history of punishment, the degree to which gender differences in penal form, severity, and frequency existed in earlier societies (Burford and Shulman, 1992:9). Some scholars (Newman, 1978:56-60; Burford and Shulman, 1992:11-18) believe that the differential use of punishment for men and women can be traced back at least to antiquity but disagree over whether punishments became more equitable during the medieval period. Burford and Shulman (1992:9) argue that women in all societies and throughout all periods of history, have always been under discriminatory and more stringent legal and penal control than men. On the other hand, Newman (1978:57) describes the penal treatment of women during the middle ages as less harsh than that of men.

The most comprehensive historical study of the punishment of women is that by Burford and Shulman in their book Of Bridles and Burnings. The Punishment of Women (1992), and much of the following discussion draws heavily from this work. Burford and Shulman (1992:11-17) suggest a connection between ancient beliefs in the preternatural

power of women and the need to bring this feminine power under male control. They theorize that ancient societies revered female fertility and fecundity, but the acquisition of knowledge of procreation, replaced the magic and mystery surrounding women with patriarchy, domination, and condemnation. They (1992:12) speculate on why early societies felt the need to socially and legally subordinate women:

Perhaps masculine supremacy harboured some deep fear that if not controlled woman might find a way to employ her powers against his overlordship. Once women were barred from establishment learning, it would be argued they possessed little skill or intellect...so whatever their apparent power it had to be of malign origin and intent and was, therefore, to be discouraged.

Ancient legal codes, like that of Hammurabi, although presented as embodiments of natural law, reflected the class stratification of Babylonian society and prescribed penal sanction on the basis of social rank. It is not surprising, therefore, to find women included as a class subject to differential legal domination. Similarly, Mosaic and Assyrian Law established legal control over female behavior and female rights. As a result, women were not only not exempt from harsh punishments, but such punishments were often gender-specific (Burford and Shulman, 1992:10).

Gender distinctions in law and punishment seem to be particularly prevalent in the types of behavior for which women, as opposed to men, were punished. It appears that the behaviors that are most frequently designated as crimes for women are those related to sexuality and reproduction, such as fornication, prostitution, adultery, illegitimacy, abortion, and infanticide; mystical behavior such as witchcraft; and, socially disapproved behaviors like scolding, gossiping, lewdness, idleness, blasphemy, and quarreling. Of

course, women were also subject to punishment for behaviors more commonly engaged in by men such as theft, fraud, assault, or murder (Burford and Shulman, 1992).

Although many of the gender distinctions in punishment that exist throughout history are linked to differences in the types of offenses for which women were more likely to be punished, there is evidence that women have received differential punishment for the same crimes as men (Spruill, 1972; Burford and Shulman, 1992). For this reason, it is worthwhile to briefly review what is historically known about gender differences in the most widely used forms of penal sanction.

Stoning. Stoning is one of the most ancient forms of collective punishment (Newman, 1978:33-35). Both the Old and New Testament have references to the execution of women by public stoning. Although it appears that women may have been more frequently subjected to stoning than men (Burford and Shulman, 1992), little direct information exists to confirm this.

Hanging. The use of hanging as a punishment can be traced back to prerecorded time. Hanging is first referred to in the Old Testament, Genesis 40:xxii, and Deuteronomy 21:xxii, for men. From biblical accounts, it appears that women were more likely to be executed by stoning as opposed to hanging (Burford and Shulman, 1992:103-104). The use of hanging for women appears in English law as early as 1120 for offenses ranging from petty to serious (Burford and Shulman, 1992:104).

Burning. Burning women at the stake has been traced back to the Code of Hammurabi. Its later use in English penal law was generally limited to serious crimes like treason or murder, but it was occasionally used for lesser offenses as well (Burford and

Shulman, 1992:34-35). Even when men and women committed the same crime, women were more likely to be burned and men hanged. Only occasionally would men receive the same punishment as their female accomplice (Burford and Shulman, 1992:35-41-46).

Mutilation and Branding. Both Mosaic and Assyrian law contained offenses for which women could have their hands cut off or receive other punishments of mutilation. English penal codes from the eleventh century through the eighteenth centuries allowed mutilation and blinding of women for a wide array of offenses. Prostitutes during the Elizabethan Age were punished by having their ears severed, their noses slit, or the muscles of their legs or thighs cut. Mutilation of women was allowed in eleventh century England for adultery, and in the fourteenth century for theivery (Burford and Shulman, 1992:14).

Whipping. Whipping was one of the oldest, cheapest, and most widely used forms of punishment for both sexes. Assyrian law allowed whipping and allowed husbands to whip or mutilate their wives without penalty (Burford and Shulman, 1992:63).

In England, wives, domestic help, and apprentices could be whipped by their masters, and children could be whipped by their parents. Whipping was used to punish a range of behavior, from petty theft, to immorality, to vagrancy. It was a common punishment for prostitution and keeping a brothel. In 1383, in England, immoral women were required to have their heads shaved, be carted through town, beaten, and banished from the city (Burford and Shulman, 1992:63-68). Illegitimacy, an offense that fell more heavily on women, could be punished with whipping or imprisonment. Women who gave birth to illegitimate children were social outcasts who were often forced into prostitution

and crime in order to survive. Even women of higher birthright were not exempt from punishment for sexual deviance (Burford and Shulman, 1992:70-71). All types of offenders could be whipped and then publicly humiliated by being placed on public display in a cage, pillory, or a stockade.

Stocks and Pillory. The use of stockades can be traced back to biblical times but the first reference to their use in England was in 1227. Stocks were used for both men and women for a wide range of offenses, most of which were fairly minor (Burford and Shulman, 1992:163-165). The use of stocks and pillories were considered light punishments, used mostly on women to shame them into more conforming behavior (Burford and Shulman, 1992:163).

Branks, Bridles. Women who were "scolds" could be whipped, pilloried, bridled, or ducked. The brank, or 'scold's bridle', first appeared in England in the fifteenth or sixteenth century. A woman could be publicly paraded wearing a brank for public humiliation. By 1600, this was accompanied by a procession of minstrels and even marching soldiers. Punishment relied primarily on public humiliation and ridicule to curb undesirable behavior rather than fines or imprisonment. However, such punishments could also be painful. Eventually spikes were put into the brank or bridle to hold the tongue down. Since they would often lacerate the tongue, it was possible for death by lead poisoning to result from this punishment (Burford and Shulman, 1992:50-54).

Branks and bridles would be used on paupers, prostitutes, or women with loose morals. Occasionally, they would be used as punishment for witchcraft or to punish women for preaching. Branks could also be used on men but they were almost exclusively

reserved for punishing women (Burford and Shulman, 1992:55-60).

Drowning and Ducking. The use of drowning as a punishment for adultery and prostitution can be traced back to the Code of Hammurabi. Its use also appears in English records from the tenth into the eighteenth centuries, although it was not part of English law (Burford and Shulman, 1992:30-33). Ducking may have developed as a variant of this and other forms of water-based punishments that have been used as far back as antiquity. The ducking stool was used to submerge the inhabitant into rivers and lakes, although mires, bogs and latrines could also be used. While it was also used on men, like the brank, it was almost exclusively used on women for petty offenses and prostitution (Burford and Schuman, 1992:80-87).

Transportation. Another old form of punishment, first recorded in the bible, and used on both men and women was transportation. Transportation was widely used in England to deal with the dislocation of serfs and peasants following the collapse of feudalism. Later, it was used in response to the increased crime and civil disturbances resulting from the dissolution of the monasteries and enclosure of lands. Transportation not only provided free labor to the colonies but it allowed England to remove itself of an underclass and of a wide range of social misfits and religious dissidents. Additionally, the transportation of women to the mostly male populated colonies became, in large part, an extension of the slave trade by making the domestic and sexual services of women available to male colonists. Women who survived the voyage were taken as wives or concubines by the colonists.

Between 1609 and 1618, hundreds of women were sent to Virginia and the West



Indian Islands from England. The first transport to Virginia included 140 women, many of whom had been taken out of gaols. Arriving in 1619, they were sold at a slave auction "against their weight in tobacco" (Burford and Shulman, 1992:187-188). The next ship transported 105 women and girls taken from prisons and bridewells.

A Proclamation Against Vice passed in 1712 increased the number of felons transported, particularly women. Transportation was further reinforced in 1718 with the Transportation of Convicts Act which allowed it to be used as an alternative to capital punishment. Over the next decade, hundreds of women who would have been executed were sent to the American colonies, primarily Virginia, the Carolinas, and later, Pennsylvania. Transported women comprised a large portion of the American female population. In 1764, Maryland had 386 women, 25% of them were convicts transported from England. Over 30,000 women are estimated to have been transported to the American colonies in the eighteenth century until this practice was finally prohibited (Burford and Shulman, 1992:188-196).

Imprisonment. The use of imprisonment, as an autonomous form of punishment, seems to be a relatively modern invention (Johnson, 1987:14). Although imprisonment can be traced back to the ancient world and is referenced in both the Old and New Testaments, its use was generally for the purpose of confinement prior to administering the real punishments which were corporal or capital.

Although canonical prisons date back to AD816, for male and female offenders of religious order, the main punishment was penance and possibly fasting. After the Norman Conquest in England, every castle contained a dungeon to assert the king's rule over

rebellious serfs.

The use of imprisonment in England has been well chronicled by Burford and Shulman (1992:139-161). The Gaol of London was London's first prison, built in 1130, and soon used to confine sexually immoral women. In 1166 the Assize of Clarendon required that gaols be built in all the counties. Those confined had no legal rights. Prisons were franchised to keepers; and, because women prisoners lacked money, they were always held under worse conditions than the men. Since male and female inmates were not segregated, rape and prostitution were common occurrences.

The famous Newgate prison was built in 1188. It held the worst criminals in greater London and is described as "one of the lowest circles of hell for the female prisoners" (Burford and Shulman, 1992:140). The first reference to a woman's prison is of one located within the Bishop of Winchester's Palace in 1247.

Throughout the thirteenth and fourteenth centuries, prisons were used primarily to house serious offenders; fines and corporal punishment was used for lesser offenses. Riots were common, conditions were unsanitary, and gaol fever often resulted in the loss of many lives (Burford and Shulman, 1992:142-144).

In England, imprisonment was first used to reform vagrant women and wayward girls in the sixteenth century. A vacant palace at Bridewell was donated by Edward VI to London in 1522 to be used as a house of correction. This became the prototype for future bridewells--intended to reform rather than punish. Inmates were trained for domestic service after release and were apprenticed in millinery and clothing manufacturing shops at substandard wages and under inhumane living conditions. It is not surprising that many

returned to prostitution. The failure of bridewells to rehabilitate resulted in a return to corporal punishment. Prostitutes and 'bawdy women' would have their heads shaved, their ears clipped, and even their faces branded or their noses slit in an unsuccessful effort to stop prostitution.

Over time, bridewells became increasingly more punitive, resembling regular prisons with branks, chains, and the rack. They were odorous and filthy breeding grounds for fever, disease, and promiscuity. They were not only used to confine females convicted of petty and public order crimes, but pious women were sent there also as heretics for refusing to recant their Catholicism. Once a woman was committed to a bridewell, it was difficult to obtain release.

As late as 1630, the sexes were not segregated, women were in various states of undress due to their clothes wearing out and not being replaced, there were no bathing facilities, and inmates were idle and violent. Women often had to resort to prostitution in order to buy food and drink (Burford and Shulman, 149-161).

Early Reform Efforts. It was conditions not much improved from these that met Elizabeth Fry on her first visit to Newgate Prison. Newgate had been built to house 427 inmates, but in 1813 it held 822. Elizabeth Fry found almost 300 women and girls--some convicted, some being held pretrial--sick and healthy mixed together with their children. They were held in two wards and two cells with insufficient clothing. They slept in rags and on dirt floors where they also cooked and ate. Their rooms and yard were open to the view of the male inmates. The women drank, swore, fought, gambled, sung, danced, begged, and dressed in men's clothing. Their behavior was so bad that even officials did

not want to visit their quarters.

Yet, Elizabeth Fry set up a school for the children and young offenders, formed the Association for the Improvement of Female Prisoners at Newgate to guarantee that the women would receive proper clothing, employment, and religious instruction while incarcerated. Her organization fought for the segregation of the sexes and female matrons to supervise the women. Inmates were to be paid for their work with part of their wages held aside for their release.

In 1818, Elizabeth Fry spoke before a House of Commons committee on prisons regarding her work and ideas for reform, especially segregation of the sexes. By 1845, some of the changes she introduced at Newgate were being instituted at other institutions. However, the conditions of confinement for most incarcerated women remain terrible (Burford and Shulman, 1992:157-158).

In the mid-nineteenth century, the typical female inmate was provided with "a plank bed by night, a pint of oatmeal gruel for breakfast and supper, and one pound of dry bread for dinner." The treadmill provided the source of hard labor and the silent system was widely used (Burford and Shulman, 1992:159).

With flogging abolished in prisons in 1820, discipline remained a problem. Solitary confinement in dark cells, restricted diets, and loss of privileges were the primary means of punishment. Overuse of solitary confinement led to physical and mental impairment of inmates.

As bad as these conditions remained in the nineteenth century, they represented a vast improvement over the treatment male and female offenders had received until that

time. Enlightenment thought on the value, dignity, and rights of the individual were gradually working their way into social consciousness. The eighteenth century writings of Montesquieu, Diderot, and Voltaire on the nature of law and justice and the relationship between law, justice, and punishment provided the intellectual stimulus for legal and penal reform. It was their ideas, that provided the intellectual framework for the reformist writings of Beccaria, Bentham, and Howard and the development of the Classical School of Criminology. Their writings advocated the abolishment of torture and a more rational approach to punishment that were eventually reflected in revised penal and procedural codes. The result was the emergence of a new penology and the gradual movement away from brutal corporal and capital punishment and conditions of severe deprivation of the imprisoned toward slightly more humane forms of punishment (Allen and Simonsen, 1978:17-24).

#### Punishment of Offenders in Colonial America

Colonial America was governed by seventeenth century British codes of law and punishment that relied upon capital and corporal punishment. Due to the harshness of these penal codes, some relief was necessary for less serious offenders. As a result, houses of correction, which were penal institutions modeled after the bridewells, and workhouses and almshouses, which were originally intended for relieving the poor by providing care and training, became co-mingled as a means of absorbing the idle and disorderly. Although these institutions were transplanted to America and used in the colonies, the most common forms of punishment remained the brank, flogging, branding, and the stocks and pillory. Jails, which were also used during this time, were not intended

for either rehabilitation or punishment but for confining those waiting trial or punishment. They were often makeshift, and it was not uncommon for them to be in a sheriff's home or in a boarding house or some other type of building (Clare and Kramer, 1976:27-38).

Enlightenment ideas worked their way into the American colonies in Pennsylvania through William Penn and the Quakers. Their "Great Law" called for the abolishment of capital punishment for all crimes except premeditated murder, and punishment through hard labor rather than torture. They eliminated religious offenses as crimes and only punished violations of criminal law. The Quakers also established houses of correction where confinement at hard labor was the punishment as opposed to being only a prelude or supplement to the real punishment. However, following the death of William Penn, the Great Law was repealed and replaced with the English Anglican Code, in 1718, which returned the colony to even harsher punishments than existed before. Capital punishment returned, as did branding, mutilation, and the use of corporal punishment in general. Yet the seeds for a more humane and enlightened approach to law and punishment had been sown. The ideas that led to even this temporary respite from brutal punishment were present and waiting to be reestablished in the coming revolution and the new Constitution (Allen and Simonsen, 1978:17-32).

Not much has been written about the punishment of women in colonial America. The little that has suggests that all colonists were held to relatively similar moral conventions, and that women and men received relatively equitable treatment. Spruill's (1972) study of women in the southern colonies indicates a preoccupation in colonial courts with sexual and moral behavior that applied equally to men and women in principle,

but that may have, in practice, been differentially applied to women. The discussion that follows draws heavily from her research.

The crimes for which most women appeared before colonial courts were adultery, fornication, illegitimacy (referred to as bastardy), and slander. The most commonly cited punishments were whipping, and ducking, although cases of women being pilloried, branded, hanged, and burned at the stake are also recorded.

Adultery, Fornication, and Bastardy. The strong religious beliefs and practices that characterized the colonists may explain part of the importance placed on regulating morality and sexuality. At least part of the concern over moral purity and the harsher regulation of female sexuality, however, may have been economically motivated. Illegitimate children became the financial responsibility of the parish in which they were born and much of the punishment surrounding this offense was in the form of fines and securities for the care of such children. This may also partially explain why women who refused to identify the paternity of their children were subject to additional fines and/or punishments. Women who were unable to pay these fines could be imprisoned until the birth of their child and then publicly whipped. Recidivists were subject to increased lashes with each subsequent offense. The father of an illegitimate child was also fined, possibly publicly whipped, and required to financially support the child until age ten (Spruill, 1972:315-317).

Unmarried, female indentured servants were subject to the same punishments for bastardy as free women but also required to reimburse their masters for lost services, usually by having the indenture extended. In some colonies, the father in such cases was

also required to financially compensate the master of a servant he impregnated, but, in other's, this responsibility was solely that of the woman. Courts were not always assiduous in seeking custody of the father who may have been difficult to locate. As a result, full sanction more often fell upon the mother of an illegitimate child (Spruill, 1972:318).

Legally, men and women were subject to the same punishments for crimes against morality, but court records indicate that men were more often fined while flogging was the punishment more often administered to women. Often flogging would be ordered if fines were not paid so this discrepancy may, at least partially, reflect the greater economic dependency of women. However, some court cases reflect disparities in punishment too disproportionate to be explained solely on the basis of gender differences in the ability to pay fines. For example, in one reported case a woman convicted of bastardy received 30 lashes on her bare back while the father of her child was only required to publicly confess his sin. Similarly, in a Maryland county, the mother of an illegitimate child received 30 lashes on her bare back while the father was required "to give good security for keeping the child and for his good behavior " (Spruill, 1972:320).

Despite these harsh punishments, bastardy does not appear to have been greatly deterred by the number of cases dealing with this offense. Instead, it may have contributed to the greater crimes of abortion and infanticide. Since it was often difficult to determine whether a newborn died of natural causes or was killed, concealing the death of a child was a punishable offense (Spruill, 1972:323-324).

Slander. Slander, gossiping, scolding, and quarelling were crimes frequently



committed by women and usually punished by public ducking. In some colonies, wives could escape this punishment if their husband's would pay a fine, but if he refused, or if the fine was excessive, the woman would be ducked with the number of duckings proportional to the amount of the fine (Spruill, 1972:330-331). Ducking was so commonly used that many southern colonies were ordered by the courts to build ducking stools. However, it does not appear that this punishment was commonly administered to men. Instead, men seem to have been sentenced to the stocks and women to the ducking stool.

Whipping and the pillory seem to have been equally used in punishing men and women for a variety of offenses, from minor to more serious. Being sentenced to the pillory, a wooden frame through which the head and hands were extended, could also mean being subjected to mutilation. Offenders so sentenced could have their ears nailed to the pillory. When released, the ears could be severed from the head and left nailed there for the remainder of the day. Spruill (1972:324-325) describes both women and men being punished in this manner for offenses such as giving false testimony, receiving stolen goods, escape from servitude and forgery.

Hanging and Burning. Like men, colonial women were also sentenced to the gallows, and, in rarer instances, to being burned alive at the stake. Spruill (1972:336) reports several instances in which male and female co-defendants in capital cases received different forms of execution, with the men being hanged and the women burned at the stake. While this is reminiscent of the medieval preference for burning rather than hanging women (Burford and Shulman, 1992:35-47), no explanation is provided for why this disparity occurred in colonial America.

Benefit of Clergy. As in England, colonial men convicted of felonies could receive leniency by pleading benefit of clergy while women, for the most part, could not use this defense. By the eighteenth century, however, there is evidence of this privilege being extended to women in some colonies. Following this, it appears that women convicted of felonies received the same punishment as men who used this defense--usually imprisonment and branding.

Under the commonlaw principle of coverture,<sup>7</sup> a husband could be held responsible for felonies committed by his wife if done in his presence. If a husband and wife were convicted together, and he plead benefit of clergy, any leniency he received would be extended to her as well. Also, if the woman's crime was compelled by her husband, under coverture she could not be held responsible for her actions. Similarly, since coverture gave men legal control over their wives' property, they were also responsible for fines imposed on their wives (Spruill, 1972:337-338).

Thus, opportunities were present in colonial law for married women to evade punishment and for most offenders to avoid corporal punishment by paying fines. However, colonial records do not indicate that this occurred often. According to Spruill (1972:339):

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<sup>7</sup>Coverture is defined as follows (Kanowitz, 1973:61):

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture* (italics in original).

[W]omen generally paid the full penalty for their crimes. They did public penance, sat in the ducking stool, and stood in the pillory. No special regard for their sex diminished the number of stripes they received on their bare backs at the public whipping post or saved them from the branding irons and the gallows. Female offenders against morality usually fared worse than male delinquents. While the statutes called for equal punishment for them, the courts frequently ordered the man to pay for his offense, with a sum of tobacco while it sentenced the woman to be whipped, not because they considered her more blameable, probably, but because she had no means with which to pay a fine. In dealing with bastardy cases, because the mother was more easily discovered and apprehended than the father, she was often sentenced to pay a fine or to be whipped and in addition to give security to maintain the child, while the father, who was difficult to find, was allowed to escape punishment altogether.

The Early Use of Imprisonment in Post-Colonial America. The use of centralized prisons for felony offenders seems to have begun soon after the Revolutionary War ended. These prisons were actually more like large houses or dormitories than prisons. The architectural design was that of a large building, divided by a central corridor with rooms large enough to house approximately 8 inmates each. At New York's Newgate Prison, women were segregated from men in a separate wing with their own courtyard. They did not have a matron and were under the supervision of a guard, but they did not appear to have suffered abuse from male guards or inmates and did not seem to be isolated from daily prison activity. Dormitory style housing allowed inmates the opportunity to converse, and the treatment received by all inmates seems to have been fairly equitable. Women performed domestic chores like sewing and washing, while men produced small handicrafts or manufactured small items like shoes. These conditions were fairly typical of those found in prisons in other states in the late eighteenth century (Rafter, 1992a:4-5).

This era of equitable treatment was soon to change in response to the changing social and economic character of post-revolutionary America and the eventual

development of the penitentiary. The turn of the nineteenth century brought demographic changes and the transition from an agrarian-based to an industrialized society which introduced new problems of social control. Institutional structures designed to contain the behavior of individuals who lived in small, homogeneous communities were quickly proving inadequate to the task of integrating and containing a more heterogeneous, mobile, and urbanized society. Social and economic roles for both men and women were changing and becoming less tightly integrated with the community. With the advances brought by industrialization and urbanization, America like other industrializing countries, underwent major social transformations. This increased the difficulty of controlling behavior--particularly of women who were experiencing greater liberty and emancipation (Chavetz and Dworkin, 1986:103-104). Social change, combined with dissatisfaction over the lack of discipline and open communication in post-revolutionary prisons, and humanitarian motivations to reform offenders, led to the birth of the penitentiary system. With this system also came greater inequities in the punishment of women.

#### The Development of the Penitentiary in America

The eighteenth century witnessed many changes in the development of law and justice, not the least of which was penal reform. From that time and throughout the nineteenth century, prisons were established across the country. The dissatisfaction with prisons that had developed in the late eighteenth century led to decades of experimentation and conflict over which architectural design and internal operations should be employed. The Pennsylvania System, developed in Philadelphia by the Quakers, used confinement, labor, and scriptural study in individual cells to remove offenders from negative influences

and facilitate penitence. The disadvantages of this model were that it was expensive to construct, did not lend itself to productive labor, and proved detrimental to the mental health of inmates through its use of constant solitude. In 1819, a different system was developed at New York State Prison in Auburn, New York that was eventually adopted by over 30 state prisons. In fact, its use of interior cells arranged in tiers dominated prison construction for over 150 years (Allen and Simonsen, 1978:35-60).

The Auburn System was able to effectively control the negative consequences of allowing inmates to interact without having to rely on solitary confinement by housing inmates in single cells in the evening and instituting a silent system during the day. Under this system, inmates could work in congregate shops without verbal communication. Part of the appeal of this model was its ability, due to its congregate work style, to adapt itself to an industrial style mode of production. Before Auburn, inmates could only produce handicrafts and were barely able to generate sufficient income for their own needs. Auburn was more attractive to taxpayers since its ability to mass produce goods allowed it to generate a profit. The Auburn System was economically self-sufficient and, in fact, even lucrative. With Auburn, the industrial prison was born -- a prison that was in perfect keeping with the changing American economy.

#### The Imprisonment of Women

The history of prison development in America is a history of men's prisons. Although women were also sent to these institutions, most women sentenced to incarceration were still confined primarily in local jails (Allen and Simonsen, 1978:29). In 1831, the sex-ratio in prisons was 12 to 1. However, in 1840, the female population

began to increase; and, in 1850, women were 3.6% of the prison population in 34 states (Freedman, 1984:11).

Still, in comparison to men, very few women were sentenced to penitentiaries. As a result, relatively little has been recorded about their confinement there, particularly in the late eighteenth and early nineteenth centuries. The two most definitive books on the history of women's prisons are Estelle Freedman's Their Sisters Keepers, (1992 [1981]) and Nicole Hahn Rafter's Partial Justice (1992 [1985]). Freedman's focus is on the development of the reformatory and prison reform during the late nineteenth and early twentieth centuries. Rafter's study is broader in scope, covering almost two centuries of prison development, and more comprehensive in its examination of custodial prisons as well as reformatories. Both works will be used as a basis for much of the following discussion.

According to Rafter (1992a:xxvi; 1992b:17), the history of inequitable treatment of women can be traced back to the origin of the penitentiary model. When prisons were small and characterized by short-term incarceration and individualized labor, women probably received very similar treatment to that of men. However, when prison design and operation changed, the treatment of women changed to one of neglect and isolation. She identifies the period of 1790-1870 as the "first stage" in the history of women's prisons, characterized by ostensibly comparable treatment. However, she notes that since women were confined in institutions and treated under a penology designed for men, their prison experiences was in reality both different from and inferior to that of men.

This disparity is partially explained by the small number of women in

penitentiaries--some housing several or fewer women. In the 1830's, one survey found only 97 women inmates in the seven most heavily populated states and the District of Columbia. An 1845 survey conducted by Dorothea Dix found only 167 female inmates from Virginia to Maine (Rafter, 1992a:10).

A further explanation is provided by the emphasis on production that characterized the early penitentiary movement. Given their small numbers, women were unable to generate revenue for the prison through their labor, which made them an economic liability.

Additionally, women were perceived by administrators as morally depraved, incapable of reformation, and a threat to penitentiary order, discipline, and routine (Rafter, 1992b:17). Their presence provided a sexual distraction that could interfere with male inmate labor if not contained. However, their small population did not financially justify building a separate prison so women remained housed in separate sections of men's prisons. Their numbers were too small to even warrant an entire wing of the prison causing them to be confined in whatever unused areas were available. Often these were attic rooms, or storage areas. Rafter (1989:91) has described the isolation of these women:

The men who ran prisons viewed female convicts as an annoyance; in their eyes, it was the women, not men, who had to be kept separate to prevent sexual mischief and scandals. Thus women were increasingly isolated. *Their* windows were nailed shut, *they* were kept from exercising in the yard, *their* quarters were located as far as possible from the main activities of the prison.

Whether emphasizing isolation and solitary labor in individual cells in order to

become "penitent," or congregate labor and discipline as the vehicle for reform, early prisons combined penal and rehabilitative goals in their treatment of men. Women were subjected to the same conditions of maximum security confinement and punishment but were not believed capable of redemption or rehabilitation. As a result, even though women were housed within the same institutions as men, they received the worst aspects of penalty and none of possible benefits of reformation. It was this, in conjunction with the the inequities and neglect that women experienced as a forgotten population within a system designed for men, that caused scholars like Rafter (1992a:xxx) to view women confined in custodial prisons as experiencing even greater hardship than men:

Consider, for example, the circumstances of a woman held alone, or with but a few others, in a predominantly male penitentiary. She had less privacy from the opposite sex and less company of her own kind. Male guards held the keys to her cell. If pregnant, she had at best access to a physician accustomed to dealing with men. If nursing, she had to find ways to care for the child in her cell--a nearly impossible task, as high rates of infant mortality in early custodial prisons attest. Moreover, the female was regarded as far worse than the male criminal and thus treated with more derision...Because they violated role prescriptions as well as the law, female criminals were doubly scorned. Penitentiary conditions that appeared similar for men and women, then, usually spelled more misery for the latter.

Unable to generate income to pay for their maintenance, incarcerated women drained prison budgets by diverting funds away from the male inmates. As a result, as little as possible was spent on their care. Matrons or specially hired female staff were costly so the women were left unsupervised, often in one big room (Rafter, 1992a:xxvi). In 1843, in Sing Sing Prison, women and children were confined in an eighteen square foot room that was so overcrowded and poorly ventilated that a baby died from the unsanitary conditions. Furthermore, because of the lack of supervision, these women



were subject to attacks from one another and from guards and even male inmates. The situation of women prisoners in New York in 1845 was described as follows (Philip, 1973:82):

So free is the intercourse among the inmates of those prisons and so effectually is the contamination of evil communication encouraged, nay, insured and enforced by the manner in which they are organized, that it is to us a matter of great doubt, whether it would not be better for an innocent female to be consigned at once to a brothel than to be confined in either of those prisons. In the former case, she would at least enjoy the advantage of being able to fly from the approach of corruption at her pleasure.

Evidence suggests that this analogy was not merely a literary one. The conditions were so horrendous at the Indiana State Prison at Jefferson that the male warden did, in fact, make the women's unit available as a brothel to male guards. Women inmates under his care were sadistically beaten and raped and illegitimate births resulted (Freedman, 1992:60).

Even access to physicians and chaplains was intermittent since their services were required by the males. Under the best of conditions, women were left alone, isolated and neglected. Women inmates at Auburn Prison, in 1825, received a daily visit from staff who left food and removed wastes (Pollock-Byrne, 1990:40). Jail conditions were not much better than this. In 1820, a jail in Philadelphia held 7 women in a cellar with only two blankets among them. Fifteen women were held in one room in an Albany jail, and the Tombs jail in New York City held 70 women in 42 cells in 1838 (Pollock-Byrne, 1990:40).

In response to growing demands for reform, many prisons moved female inmates to facilities outside the prison enclosure, either across the street or several miles away on

prison farms. Often, this only further reduced the women's access to prison facilities, services, and staff, especially physicians and chaplains. Once removed from prison grounds, however, these inmates were provided with a matron to supervise them.

Living conditions were not much better for the matron or her staff than for the inmates. The salaries were low and there was no professional autonomy since the women's units were still under the authority of the male wardens. As a result, turnover was high, and it was difficult to recruit qualified, dedicated, and caring female administrators and staff. Even with regard to physical maintenance, the women's facilities were the last to be repaired, perpetuating the neglect that characterized the treatment of female inmates (Rafter, 1983b:136).

Although different states varied in their treatment of women, Rafter (1992a:xxvi-xxix) has characterized the early history of women in custodial prisons as a sequence of stages intended to separate female from male offenders. Initially, women were held in separate rooms of large dormitory-style buildings but were still part of daily prison activity. Then they were moved to separate, make-shift quarters in whatever locations were available within the men's prisons where they were isolated and neglected. Finally, they began to be moved into separate facilities outside of the men's prison where their neglect and isolation was further heightened.

Throughout this period, women received mixed treatment in which each instance of leniency is counterbalanced by a special hardship. The discipline women received was less harsh than that of the men. However, since this was due to less supervision, it ultimately resulted in a less physical protection from abuse from male guards and other

inmates and less access to services, staff, and even to outdoor air and activity. Women were able to communicate with each other while the men were restricted to silence, but this also meant that they had less privacy than men housed in individual cells in the evening. Also, the grouping together of female inmates meant that the women did not receive the benefits of classification by offense or offender behavior. This made them more vulnerable to the abuse of other female inmates, particularly those who were violent or mentally ill (Rafter, 1992a:6-10).

According to Rafter (1992:xvi-xvii), these conditions created a double-standard in the perception and care of female offenders that led to the continuing neglect and isolation of women felony offenders incarcerated in custodial prisons and the evolution of separate prison system for young, misdemeanor offenders who previously were not subjected to long-term incarceration.

By the end of the nineteenth century, all state prisons had a female unit of some type. Those states with small female populations kept them located within the men's prison. Those with larger female inmate populations built separate facilities outside the grounds of the men's prison. For most of this time period, women were held in custodial institutions. Dominated by a philosophy of retribution, the architectural design, administrative organization, internal policies, rules and discipline of these institutions reflected a masculinized model of penology.

Gradually, dissatisfaction with the inability of the custodial prison to rehabilitate combined with changing social conditions that were loosening the informal control mechanisms that regulated female lives. Newly emerging definitions of femininity and

criminality led to the evolution of the reformatory. A reformatory, as defined here, is a penal institution that is specifically designed for younger, less hardened offenders, with an emphasis on rehabilitative rather than purely punitive objectives. Reformatories were used for male as well as female offenders, but not all states developed reformatories. They were particularly popular in the midwest and northeast but rarely established in the south or west.

The development of reformatories was based upon a different perception of female criminality than had previously existed. It introduced a new treatment model for women offenders that targeted young, misdemeanor offenders whose crimes were primarily public order offenses. The intention and purpose of the Reformatory Movement was to reach out to wayward and immoral women so that they may be reformed and returned to their natural feminine roles and behavior. Therefore, even states that did experiment with reformatories, still maintained a custodial unit either in or near the men's prison for older, more hardened female offenders, or for serious felons.

Although considerable emphasis is placed on the Reformatory Movement in the literature on women's prisons, it actually represented a relatively brief period within the history of women's prisons. Reformatories and custodial prisons existed concurrently. When the reformatory movement began to decline, the misdemeanants were moved out, and the female felony population from the men's prisons were moved in, reestablishing the dominance of the custodial model (Rafter, 1989: 92-93; 1992a:81-82).

Despite its short history, the Reformatory Movement had a significant impact in shaping social definitions of female criminality. It also exemplifies how reform efforts can

produce unintended consequences in which the reforms themselves may create conditions equal to or worse than those they sought to ameliorate. Even after its decline as an institutional model, the changes the reformatory introduced in the care and treatment of female offenders modified the custodial prison and led to the creation of the contemporary women's prison. Many of the current deficiencies, problems and needs associated with modern women's prisons are directly linked to the historical development of the custodial and reformatory models. Therefore, in order to understand women's prisons today, it is necessary to first understand the philosophy and impact of the Reformatory Movement.

#### The Rise of the Reformatory Movement in America

An amalgamation of social changes associated with the Civil War led to an interest in female criminality and incarcerated women. Four primary factors have been identified as providing the impetus for the Reformatory Movement. First, female crimes of abortion and prostitution had increased as a result of the Civil War. Second, a large constituency of strongly religious, upper-middle class women had become interested in social reform through the abolitionist movement, and through providing war relief efforts ranging from fund-raising, to emergency and long-term medical care of the injured, and social welfare services to war-torn families and communities. Following the war, these women turned their social activism toward post-war social problems. This eventually led to the formation of temperance organizations; moral crusades against alcohol use, illicit sexual behavior, and child abuse; campaigns to promote child welfare, delinquency prevention, and female suffrage; and the salvation of deviant or "fallen" women. Third, an entire platform of progressive reforms and social activism that targeted and encompassed a wide

range of social problems and needs was beginning to develop, providing further momentum to this newly emerging coterie of reformers. Lastly, female social activists were becoming instrumental in redefining femininity and woman's natural role in society (Freedman, 1984:39; Pollock-Byrne, 1990:44).

It was reformers such as these that first organized the Magdalen Society in New York City, in 1830, and the Women's Prison Association (W.P.A.), in 1845, which established the first half-way houses--Magdalen Home and W.P.A.'s Hopper Home. These houses reflected the reformer's belief that the salvation of fallen women would only be achieved by separation from men and the modeling of 'virtuous women' of social and moral purity that would enable these women to accept their natural roles as wives and mothers (Feinman, 1986:36). These organizations were inspired by the earlier work of Elizabeth Gurney Fry at Newgate Prison in England, which established the ability of women offenders to be reformed. John Griscom brought Fry's ideas to America in his work with juvenile offenders and the formation of the Society for the Reform of Juvenile Delinquents. It was Griscom who established the first house of refuge for female juvenile offenders which provided the model for Magdalen Home and Hopper Home (Lewis, 1965:160-161). In fact, a number of private, religiously based community residential facilities opened that worked to move women out of almshouses, local jails, and prisons as well as encourage them to voluntarily leave "brothels and dance halls" and enter these "homes." The result was a marriage of formal and informal control over women. Courts accepted these homes as alternatives to incarceration and sentenced women to them instead of jail or prison. The courts also sent a matron to Magdalen House to help

supervise the residents and report back to the prison officials on their progress (Feinman, 1986:37).

Early reformers had strong beliefs about gender and sex-role differences which they sought to reproduce within the women's reformatory. They continued to work for change and to push for the creation of a separate women's prison. Reinforced by Fry's success in England, as well as the success of community programs in saving deviant women, reformers sought to redefine these women. No longer were they seen as the cause of moral depravity in men, incorrigible and beyond redemption. Instead they became viewed as vulnerable, impressionable, child-like and, thus, easily led astray. To the reformers, deviant women were victims of the corrupting influence and exploitation of men--women who had fallen from a higher state of moral goodness and purity. Rather than castigation, they required "rescue" and "saving" so that they might be restored to their proper moral status. Early reformers focused their saving efforts on women who were on the road to perdition--vagrants, prostitutes, alcoholics, unwed mothers, and delinquents (Rafter, 1983a:289-291; Freedman, 1984:22-35).

By 1874, the first totally autonomous female institution, resided in and staffed entirely by women, the Female Prison and Reformatory Institution for Girls and Women, opened in Indiana. With the opening of this institution the Reformatory Movement was initiated (Freedman, 1992:50-52).

The reformatory movement encompassed juvenile offenders and men, as well as women. However, there was a qualitative difference in the way in which this system operated for women. Men's reformatories only received young felons. Although their

crimes were serious, because of their young age (approximately 18-30), they were considered less hardened and more amenable to a correctional program that emphasized education and training. Discipline remained harsh and similar to that of the state prison, but the inmates were provided with an opportunity to acquire job skills that could be used to rehabilitate themselves after release (Freedman, 1992:54; Rafter, 1992a:23).

State reformatories varied in their admissions criteria. However, most women's reformatories, unlike custodial prisons, focused on misdemeanor women who committed public order offenses like drunkenness, prostitution, disorderly conduct, lewdness, illegitimacy, or being incorrigible or defiant of parental or spousal authority (Freedman, 1992:78-85). These were offenses for which men would never be incarcerated in a reformatory, assuming they were to even be prosecuted (Rafter, 1992a:35-36). In 1934, 20% of women's reformatory commitments were for sex offenses and 14% were for larceny. The offenses for which women were most frequently incarcerated at that time were, in order of frequency: disorderly conduct, drunkenness, fornication, prostitution, vagrancy, and larceny (Potter, 1977:11). The existence of the female reformatory often insured differential sentencing practices on the basis of gender (Gibson, 1973:212).

The "double standard" introduced by the reformatory not only allowed differential sentencing on the basis of the offense for which one could be held in long-term confinement, but it also legitimated the creation of different correctional programs on the basis of gender (Rafter, 1992a:36).

The design of women's reformatories was similar to the reform schools being established during this time period for juveniles. Reformatories were not surrounded by



high walls and barbed-wire fences like the men's prisons. They tended to be located out in the countryside, contained large tracts of open land that could be used for planting and outdoor activities. Rather than an Auburn-style building with interior cell blocks, reformatories usually consisted of small cottages that were conducive to family-style living (Rafter, 1992a:33-34). The matron and staff functioned as surrogate mothers and role models. Male reformatories sought to build character, instill discipline, and help inmates acquire necessary job skills through education and training. The correctional program was designed to resocialize their behavior, and upon release, it was expected they would enter the job market. Female reformatories sought to instill an acceptance of the female domestic role and to inculcate feminine values, attitudes and personal qualities. The skills that were taught consisted of domestic training--learning to cook, sew, and manage a household. The correctional program for women was designed to resocialize (Freedman, 1992:52-58). Upon release, most of these inmates were paroled into homes as live-in domestic servants (Rafter, 1992a:xxviii; Freedman, 1992:90-95).

Since reformatories viewed deviant women as childlike and easily corrupted by immoral influences, inmates were considered to need firm supervision and protection. As a result, the correctional program was also modeled after that which was developed for juvenile offenders. Punishment was primarily denial of privileges and confinement in their rooms. Reformatories sought to teach women the error of their ways so that they would make more appropriate life choices upon their release. Instead of teaching inmates independence, however, the controlled correctional environment served to infantilize them (Rafter, 1992a:38-41; Freedman, 1992:153-155). Additionally, due to the limited range of

occupational opportunities available to women in the outside society, the vocational training they received was limited. Since prison reformers emphasized the importance of domestic values and skills in resocializing female offenders, and since domestic occupations were those most widely available to women, inmates were trained for domestic work rather than taught trades that would enable them to obtain higher paying jobs upon release (Freedman, 1992:90-91).

Only four reformatories opened in the late nineteenth century, but between 1900 and 1940, as a result of well-organized lobbying and the appointment of politically influential female reformers to administrative positions within prison authorities, reformatories were created in 23 states (Freedman, 1992:144). This success was also attributed to two other factors: (1) early reformers were able to demonstrate their ability to administer correctional institutions, and (2) the ideal of these reformers reflected the reform ideas of the more encompassing Progressive Movement of social reform.

The Progressive agenda was both broad and diversified, including political, social, and moral activism, and reflecting a plurality of beliefs, interests, causes, and movements that are difficult to easily categorize. Politically, Progressive reformers advocated women's suffrage, the eradication of political corruption, criminal justice reform, the elimination of urban slums, the elimination of unfair and exploitive labor practices, and the eradication of poverty. Reformers worked to make government more responsible to its citizenry by organizing community relief efforts that targeted a range of social ills. These included problems of public health, housing, education, family violence, child welfare, crime, and unemployment. In addition to social welfare reform, Progressive reformers

addressed problems of moral decay and reform, targeting prostitution, substance abuse, venereal disease, gambling, and all other forms of vice (James, James, and Boyer, 1971:xxxiii-xxxvi). It is not surprising, therefore, that Progressive reforms and prison reforms merged in the development of the Reformatory Movement (Rafter 1992a:45-54; Freedman, 1992:109-125).

According to Freedman (1992:109), women's prison reform began to slow at the end of the nineteenth century. However, it was reinvigorated in the early twentieth century, by a new generation of female reformers who were well-educated and career oriented and who changed the philosophy and objectives of women's penology.

Coming out of academic backgrounds in social work, law, medicine, and the social sciences, they introduced new ideas about the causes of female crime and new methods for its control. Drawing from the Progressive ideas regarding the criminogenic nature of modern industrial society, they challenged the biogenic theories of crime causation that dominated penology. Their research rooted the causes of female crime in economic need and limited economic opportunity. They emphasized the need for a correctional program that reformed rather than punished or warehoused women (Freedman, 1992:109-124). In addition to efforts to establish a separate penal system for women, these reformers worked to develop a range of preventive social service programs at the community level (Freedman, 1992:126). However, in doing so, they deflected energies away from institutional reform. Freedman (1992:126) has observed that it was partly the success of the community-based alternatives to penal institutions that hindered prison reform and "helped create institutions of last resort."

Despite the improvements that the Reformatory Movement brought to the confinement conditions of women prisoners, by 1935 it had begun to decline in strength. The seeds for its demise had been sown decades earlier, however. Heightened concerns over prostitution during and following World War I resulted in new and more rigidly enforced anti-prostitution laws and eradication campaigns. Consequently, greater numbers of women were being sent to county houses of corrections and reformatories for prostitution. This, combined with increased incarceration of alcoholic and drug-addicted women, led to a continuing expansion of women's prisons. Although women's prisons continued to be established, the reformatory, as it was idealized in late nineteenth and early years of the twentieth century continued to exist in name only.

#### The Decline of the Reformatory Model and the Creation of the Modern Women's Prison

There were several reasons for the decline of the Reformatory Movement. First, statutory changes as well as changing enforcement policies brought more women into the prison system. Reformatories were becoming overpopulated which interfered with their administration. Second, in addition to overpopulation, the characteristics of women inmates were changing. Not only were more women coming into the system, but the success of community programs, and increased use of probation and parole filtered those offenders who were more easily reformed out of the prisons. Those that remained had more serious mental, drug, alcohol, and behavioral problems which made them more difficult to successfully rehabilitate. Recidivism became a growing problem and dissatisfaction with the management of women's prisons, as well as disillusionment with the ability of the reformatory to reform, increased (Freedman, 1992:137-142). Third, the

economic impact of the Great Depression made it difficult for states to afford maintaining misdemeanor offenders in expensive reformatories. Wardens were pressuring politicians to relocate the women in the men's prison to the reformatories because of overcrowding. Several states transferred the misdemeanants back to the local jails where they had previously been held and converted the women's reformatories into prisons for female felons (Rafter, 1992a:xxix).

Once the Reformatory Movement ended, the reformatory itself as a specialized correctional facility also came to an end. The historical legacy of the Reformatory Movement has been mixed. Its most important contributions were most likely those of providing a break from the custodial model, pioneering rehabilitative ideals in corrections, and focusing attention on the needs of women prisoners (Howe, 1990:11; Rafter, 1992a:23). By advocating the construction of separate prisons for women, reformers were able to incorporate humanistic values into the design of women's prisons making them architecturally less repressive and controlled than prisons designed for men (Gibson, 1973:214). Additionally, women's prisons were among the first penal institutions to conduct criminological research that emphasized environmental and economic sources of crime rather than hereditary (Gibson, 1973:214; Freedman, 1992:111-125).

Although some reformatories, particularly Framingham in Massachusetts under the leadership of Jessie Hodder and Miriam Van Waters, and Bedford Hills in New York under the leadership of Katharine Davis, experimented with innovative ideas of classification, parole, work release, and individualized treatment, (Mennel, 1980:709-711; Freedman, 1992:130-138; Rafter, 1992a:41-43) not all reformatories adopted these ideals

of rehabilitation and reintegration (Gibson, 1973:217; Freedman, 1992:138; Rafter, 1992a:43). Reformatories also introduced negative features that still characterize the contemporary women's prison. Some of these include the infantilization of inmates; overly routinized and restrictive discipline; an emphasis on acquiring feminine skills and acting like "ladies;" isolation; and inadequate medical and legal services, educational and vocational training and recreational and work opportunities.

Additionally, although women prison reformers recognized the link between women's work and women's crime, they were unable to recognize the need for a systemic restructuring of women's work and family roles. Their goal was to increase the occupational opportunity available to women, improve wages and working conditions, and provide women with vocational skills. It was not to eradicate economic, racial, or gender inequality (Freedman, 1992:124-125; Rafter, 1992a:45-46). As such, it fell short of meaningful and comprehensive reform. To these limitations were added the second-class status and lack of equal prioritization of women's institutions with regard to funding, staffing, services, and general conditions. According to Rafter (1989:94), "the reformatory legacy now mixed with elements of the custodial style, especially its tradition of neglect." The result was that the reformatory and custodial models were combined into what has become the contemporary women's prison.

States that did not participate in the reformatory movement, continued to incarcerate women in accordance with the male custodial model. Even when female prison populations began to grow, forcing states to open separate women's prisons with separate superintendents, a legacy of differential treatment, neglect, and inferior conditions

of confinement continued to characterize female corrections.

Reflecting on this legacy, Rafter (1992a:xxx) has noted that if "justice" is defined as "fairness" and "equal treatment," the treatment of women in corrections has not been "just." Even when subjected to the same general treatment as men, the conditions of confinement were, nonetheless, inequitable due to the small size of the female population and a lack of knowledge about or interest in female offenders by male administrators. In the first stage of women's imprisonment, women were a nuisance, to be tolerated but with as little attention, care, expense or time as it was possible to provide. Male administrators understood the male experience and, thus, were more capable of understanding the male offender. By contrast, they could not understand, relate to or appreciate the female experience. Living in a social world dichotomized by gender, their exposure to women in all aspects of their lives was limited. Conceptual parameters for defining gender roles and relationships were rigidly fixed by generations of social history that was sexually stratified.

To the extent that class barriers obscured an understanding of the relationship between crime and the oppression, exploitation, and subjugation of one class by another, prison administrators were blind to the motivational world of the inmates in their charge. Added to the barrier of class was the additional barrier of sexism. Men raised in a world that separated them from their social and economic inferiors were one dimension further removed from women, even of their own class. In view of this, it is not surprising that male administrators isolated and neglected the women in their charge and created a prison experience for women that was physically and psychologically distinct from that of men (Rafter, 1992b:17).

The history of women's imprisonment is rooted in gender stereotypes that determined and continue to influence the physical conditions of confinement, the availability of correctional programming and services, and the overall correctional treatment of women. According to Freedman (1992:143), women's prisons "could not transcend their legacy of 'separate but equal.' Despite the new life brought by Progressive reformers, women's prisons, like other American institutions, would continue to reinforce sexual difference and sexual inequality." The next section will examine how the gender stereotyping that underlies inequality in prisons is disadvantageous to both men and women but in different ways.

#### Gender Differences in Conditions of Confinement

Gender stereotyping and small female correctional populations have contributed to the two major problems that characterize women's prisons -- isolation and heterogeneity. Almost all gender differences in the physical environment, policies, rules, procedures, programming, services, and overall conditions of confinement in contemporary corrections can be attributed to isolated and heterogeneous female correctional institutions (Arditi, et.al., 1973:1231-1243; Fabian, 1979:17018; 1980:177).

Isolation. Whether it is because they are segregated within sections of men's prison or sent to institutions in either remote locations or distant from their friends and families, women prisoners tend to be more isolated than males.

Almost every state operates at least one women's prisons (Nesbitt and Argento, 1984:38-40). Originally, these prisons were intentionally located in rural areas in order to remove women from the corrupting influence of men and cities. With expanding



communities, women's prisons today are closer to services than previously was true but still tend to be less accessible to public transit (Burkhardt, 1973:382; Glick and Neto, 1977).

Women's prisons comprise only 7% of all state and federal prisons in the United States (Greenfield, 1992:xii). States with extremely small numbers of female prisoners may not have a separate prison for women. In this case, women may be transferred to institutions in other regions or states or confined in separate areas of men's prisons usually resulting in restricted access to prison areas, services, staff, activities, and programs. In any of these cases, the consequences of isolation and remoteness are restricted visitation from family and friends, particularly among low income inmates for whom travel may be financially prohibitive, and less access to the range of community resources available in urban locations. As a result, women have less access to vocational, educational, medical, and technical services and programs. It also means that furloughs and work and study release opportunities will be more difficult to arrange because of travel distances (Gibson, 1973:219-223; Champion, 1990:464-465).

Remote locations also make it difficult to recruit well-qualified staff especially in consideration of the low salaries paid by most correctional institutions which further fails to provide financial incentive that would encourage competent candidates to relocate (Fabian, 1979:16-18; Smith, et.al., 1982:17; Rafter, 1989:94; Champion, 1990:464-465). An American Correctional Association (ACA) survey on women offenders found that most staff training in women's prison is on-the-job-training, and the average salary for a correctional officer is \$15,712 (ACA, 1990:30), slightly lower than the average starting

salary for a correctional officer nationwide of \$16,000 (Champion, 1990:350).

Heterogeneity. The small number of women in prison also means fewer institutional facilities for women. Only 71 of the 1,037 state and federal prisons operated in 1990 housed women (Greenfield, 1992:xii). Of 48 states surveyed by the National Institute of Corrections (1991:6), only 13 states had more than one women's prison. This means that all classes of offenders are sent to one institution, creating a more heterogeneous population (Arditi, et.al., 1973:1234-1236; Singer, 1973:336; Alpert, 1978:315). Women who are mentally retarded or mentally ill are often housed with the general population (Nesbitt and Argento, 1984:20). Combining diverse categories of offenders within a small and restrictive physical area creates a tense and stressful internal environment (Gibson, 1973:219; Fabian, 1979:19; Herbert, 1985:1183-1184; Rafter, 1989:94-95; Champion, 1990:464-465). It also means that, programming must encompass the treatment needs of the entire population.

An additional problem is that all inmates are subjected to the highest security requirements (Gibson, 1973:221-222). The security needs of one segment of the institutional population may restrict the habilitation<sup>8</sup> needs of a different segment of the population that could be confined under less secure conditions. This is a particularly important issue, since security levels are often the primary criterion for determining assignment to jobs, school, and treatment (Nesbitt and Argento, 1984:51-52). Also, the larger the portion of an institutional budget that must be spent on security, the less funding

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<sup>8</sup>Burke and Adams (1991:14) use the term habilitation instead of rehabilitation because "many offenders have deficits in education, employability, parenting, decision-making, and general competence at life that they have not lost, but rather never had."

available for treatment (ACA, 1990:22).

The problem of heterogeneous populations is central to the issue of classification which is particularly problematic for women's institutions (Giallombardo, 1966:351-352; Burke and Adams, 1991). Classification is a universal term but it has a variety of applied meanings depending upon the administrative level at which it is being utilized.

Classification systems have been developed to address the primary problem of managing high risk inmate behavior in order to insure a safe and secure institutional environment. Organizationally, corrections' departments use the term classification to refer to the assignment of inmates to institutions. At this level of meaning, classification has less relevance for women inmates since institutional and community facilities are less numerous than they are for men. Clinically, classification is used in reception-diagnostic centers or within institutions and is defined as a mechanism for assessing and diagnosing inmate's rehabilitative needs and assigning them to treatment. Institutionally, classification refers to the process of assigning housing and work assignments, and is concerned with security needs foremost. Treatment needs receive secondary consideration, and then only to the extent that they are compatible with security requirements. Thus, classification occurs at different levels, over different time periods, and reflects different dimensions of concern and objectives, some of which may conflict with one another (Burke and Adams, 1991:3-16).

All institutions need to balance concerns for security with concerns for habilitation. Institutions with violent and unruly populations must concentrate greater resources on security objectives while those with essentially non-violent and manageable populations

are able to direct resources toward habilitation objectives. Classification schemes developed for one type of institutional setting will be inappropriate for the other. Men's prisons more typically fit the former categorization and women's the latter (Nesbitt and Argento, 1984:50). Yet, most states use the same system for classifying male and female inmates. Since the environment in women's prisons is more supportive of an emphasis on habilitation, most practitioners believe that classification systems designed for male institutions are inappropriate for female populations in that they divert resources toward security and away from habilitation. Inappropriate classification systems result in women being overclassified at a higher security level that is necessary. This, in turn, has a detrimental effect on inmate access to programs and services (Nesbitt and Argento, 1984:50-53; Burke and Adams, 1991:13-16).

The isolation and heterogeneity that stems from small female inmate populations, when combined with sex-role stereotypes regarding differences in nature between males and females, results in fewer and less diverse vocational and work opportunities for women inmates in comparison to men. Gibson, (1973:223-225) has observed that exaggerated standards of cleanliness and the use of institutional maintenance as vocational training as well as punishment in women's prisons has lead to housework replacing the "rock pile."

An additional consequence of the persistent influence of sex-role stereotypes on institutional procedures is that rules are more numerous and rigid than in men's prisons. Women's prisons are often described as less secure and more physically attractive because they are smaller in size and because female populations are less violent. However, the

advantage of a smaller staff-to-inmate ratio in women's prisons in comparison to men's can result in higher levels of surveillance and tension. Women inmates are often subjected to more rules and to constant supervision by staff. The intensity of staff supervision in women's prisons functionally replaces the structural barriers found in men's prisons and serves to exert even greater control over inmate behavior (Singer, 1973:337; Fabian, 1980:177-178). The degree to which incarcerated women are regulated, in view of the fact that they are less aggressive and less likely to riot than men, can only be explained as an attempt to infantilize them and increase their dependency (Burkhardt, 1973:103-135; Leonard, 1983:55). The lack of power and personal control experienced by female inmates has been linked to reduced self-esteem and likelihood of rehabilitation (Fabian, 1979:19-21). Many women enter prison exhibiting high dependency needs that are reinforced by an institutional environment that fails to help them become more autonomous. A 1990 survey (ACA, 1990:50-57) reveals that 28.3% of women in prison have never had a driver's license, 32.8% have never had a checking account, and 64.7% report being somewhat or very much influenced by peers in their decision-making. More than half of all women in prison have a history of physical, sexual, or emotional abuse. Furthermore, 71.4% of those who reported the abuse to someone else, said that the situation was either unchanged or made worse as a result. Experiencing abuse and having it continue or at the very least having the perpetrator go unpunished can only foster a sense of powerlessness and loss of control. It is not surprising, therefore, that 79.5% of all female state prison inmates report using drugs (Snell, 1991:31).

In order to assess the adequacy of programs and services available to women, it is

important to understand the characteristics of the typical female inmate. Table 7 shows that, like their male counterparts, women in prison tend to be young, undereducated, poor, and non-white. Unlike men in prison, women are less likely to be employed at time of commitment, more likely to have ever been married, more likely to be a custodial parents and more likely to have been incarcerated for a property or drug-related offense (Fabian, 1979:8; Nesbitt and Argento, 1984:44-48; Greenfield and Minor-Harper, 1991:2).

It can be seen in Table 7 that women enter prison with educational, vocational, and treatment needs that are similar to those of men (Fabian, 1980:178). However, women also enter prison with different or more acute needs than men in the areas of parenting responsibilities, and medical and health services (Nesbitt and Argento, 1984:20-21 and 50). The next section will examine the correctional needs of incarcerated women in more detail.

### Correctional Problems and Needs of Incarcerated Women

Vocational and Educational Needs of Women. Prior to incarceration, almost half of women inmates (49.5%) attended a vocational school and 72.9% had a history of employment in either clerical, sales, or service positions (ACA, 1990:62-63). However, vocational programs that train women in clerical, food service, sewing, or cosmetology skills are the most commonly available and the most widely attended (National Institute of Corrections, 1984:x-xii and 15-23). Thus, prison programs are duplicating the skills that women are already most likely to possess and failing to provide a wider range of opportunities for inmates to acquire different or additional skills or skills in non-traditional fields that are higher paying (Fabian, 1979:19-20). Some research has found the

Table 7. Characteristics of State Prison Inmates, by Sex, 1991

Characteristic	Percent of Prison Inmates	
	Female	Male
<b>Race/Hispanic Origin</b>		
White, non-Hispanic	36.2	35.4
Black, non-Hispanic	46.0	45.5
Hispanic	14.2	16.8
Other	3.6	2.3
<b>Age</b>		
17 or younger	0.1	0.7
18-24	16.3	21.6
25-34	50.3	45.4
35-44	25.5	22.6
45-54	6.1	6.6
55 or older	1.7	3.3
<b>Marital Status</b>		
Married	17.3	18.1
Widowed	5.9	1.6
Divorced	19.1	18.4
Separated	12.5	5.9
Never Married	45.1	55.9
<b>Education</b>		
8th grade or less	12.1	14.4
9th to 11th grade	29.5	26.7
High School graduate	42.9	46.5
Some college or more	15.5	12.3
<b>Prearrest Employment*</b>		
Employed	47.1	70.1
Full-Time	37.1	58.4
Part-Time	10.0	11.7
Not Employed	52.9	30.0

Source: Tracy L. Snell, "Correctional Populations in the United States, 1991," Bureau of Justice Statistics (Washington, D.C.:U. S. Department of Justice, 1993), p. 26.

\* Prearrest Employment figures for 1991 are not available, these figures are from the 1986 survey of inmates in state correctional facilities, Lawrence A. Greenfield and Stephanie Minor-Harper, "Women in Prison," Bureau of Justice Statistics Special Report (Washington, D.C.:U.S. Department of Justice, 1991), p. 2.

vocational training offered in women's prisons to be ineffective in rehabilitating inmates and reducing recidivism because of its failure to increase or expand the extant level of skills the inmates possess (Noblit and Alpert, 1979:207-208; Chapman, 1980:110).

Almost half of women in jail and prison have less than a high school diploma (Sourcebook, 1992:595,622), 60.1% have received welfare at sometime in their life (American Correctional Association, 1990:64), and 70% of incarcerated women are single parents (National Women's Law Center, 1993:2). One-fifth of incarcerated women cite economic pressure as the reason for their criminality (ACA, 1990:69). Yet, only 10% of female inmates are employed in prison industry programs, the most common of which is sewing (National Institute of Corrections, 1984:xi; Fox and Stinchcomb, 1994:480). Despite the apparant need for incarcerated women to obtain marketable skills in fields that will enable them to earn enough money to support a family, the average number of educational and vocational programs in correctional facilities for women is 3 in comparison to men's prisons where the average number of available programs is 10 (Fox and Stinchcomb, 1994:480).

Substance Abuse and Treatment. As has been shown, most women in prison have a history of regular drug and alcohol use. In fact, regular drug use appears to be more common among incarcerated women than men. A recent American Correctional Association survey found that 57.1% of female inmates use alcohol; 24.7% use heroin; 32.4% use cocaine; 33.3% use marijuana on a daily or weekly basis; and 74% first starting using drugs or alcohol between the ages of 13 and 14 (ACA, 1990:59-60).



Table 8. Drug Use by State Prison Inmates, by Type of Drug and Gender, 1991

Drug Type	% <u>Ever used drugs</u>		% <u>Regular drug use</u>		% Used drugs <u>in month before</u>		% Used drugs <u>daily in month</u>		% Under drug <u>influence at time</u>	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Any drug	79.4	79.5	62	65.3	49.6	53.9	35.7	41.4	30.6	36.3
Marijuana	74.3	65.3	52.7	39.5	32.8	20.5	21.6	11.7	11.8	4.6
Cocaine/crack	48.9	60.3	31.3	43.5	24.6	36.5	15.4	25.5	14.1	22.6
Heroin/opiate	24.9	31.0	14.9	22.8	9.3	15.9	6.9	13.2	5.5	11.3
Stimulants	29.6	31.0	16.4	18.9	7.6	7.6	4.8	5.1	2.8	2.8
Amphetamine	26.7	27.4	13.4	15.1	5.1	4.6	3.1	3.0	1.1	0.09
Hallucinogens	27.0	24.3	11.6	9.3	3.8	2.2	1.4	1.1	1.6	1.1
Depressants	23.9	26.6	10.6	13.4	3.7	5.0	1.9	2.9	0.9	1.4
Barbituates	20.5	23.6	9.2	11.8	3.4	4.8	1.7	2.8	0.8	1.3
Methaqualon	15.8	16.9	5.2	6.5	0.9	0.8	0.4	0.3	0.1	0.1

Source: Tracy L. Snell, *Correctional Populations in the United States, 1991*. Washington, D.C.: U.S. Department of Justice, 1991:33.

As Table 8 shows, although equal numbers of males and females report having ever used drugs, females are slightly more likely to use drugs regularly. Furthermore, women use all drugs more frequently than men except for marijuana and hallucinogens. They are also more likely to have been under the influence of drugs at the time of committing the offense for which they were incarcerated. As can be seen in Table 9, the use of drugs, particularly major drugs, on a regular basis is even more prevalent among women in jail than it is among women in prison. A comparable number of female jail and prison inmates report being under the influence of drugs at the time of their offense.

Table 9. Drug Use by Jail Inmates, by Gender, 1989

Drug Use	Percent of Inmates	
	Male	Female
Ever Used	77.4	83.6
Ever Used on a Regular Basis	56.8	70.0
Used in Month Before Current Offense	42.7	55.1
Used Daily in Month Before Current Offense	28.6	40.1
Under the Influence at the Time of Current Offense	25.9	37.5
Major Drug*		
Ever Used	54.5	70.7
Ever Used on a Regular Basis	35.4	56.7
Used in Month Before Current Offense	25.9	43.9
Used Daily in Month Before Current Offense	15.7	31.8
Under the Influence at the Time of Current Offense	16.8	31.3

\*Major drugs are cocaine, crack, heroin, PCP, LSD, & methadone

Source: Sourcebook of Criminal Justice Statistics, 1992. Washington, D.C.: Bureau of Justice Statistics, 1993:603.

A closer look at drug use by female jail inmates from 1983 to 1989 reveals an overall increase from 50.5% of inmates in 1983 to 55.1% in 1989 (Table 10). Perhaps even more telling, however, is the shift in types of drugs used. In 1983, fewer women used major drugs, and the most commonly used drug was marijuana. In 1989, the use of major drugs by women increased while other drug use decreased. The mostly commonly used drug was cocaine which more than doubled in use from 1983 (Sourcebook, 1992:603).

It has been estimated that drugs are involved either directly or indirectly in the confinement of 95% of the women's jail population at Riker's Island in New York City

(Church, 1990:20). A recent needs assessment conducted at the New Hampshire State Prison for Women found that over two-thirds (69%) of the inmates reported that drugs or alcohol had interfered with their ability to function in life (Franklin Pierce Law Center, 1993:17). Moreover, slightly over three-fourths (76%) who reported that their ability to function was affected by drug and alcohol use had a history of prior arrests (Franklin Pierce Law Center, 1993:34).

Table 10. Drug Use by Female Jail Inmates, by Type of Drug, 1983-1989

Type of Drug	% of Inmates Who Had Used Drugs			
	In Month Before Offense		At Time of Offense	
	1983	1989	1983	1989
Any Drug	50.5	55.1	31.2	37.5
Major Drug	27.1	43.8	20.9	31.3
Cocaine or crack	15.2	39.3	7.4	24.9
Heroin	17.3	15	12.9	12
LSD	1.4	0.8	0.7	0.1
PCP	3.7	2.1	2.2	0.8
Methadone	1.7	1.1	2.2	0.7
Other Drug	39.8	27.4	16.6	9.9
Marijuana	33.4	23.4	8	5
Amphetamines	8.7	6.6	4	4.1
Barbituates	6.9	3	3.1	1.4
Methaqualone	2.6	1	1	0.2

Source: Sourcebook of Criminal Justice Statistics, 1992. Washington, D.C.: Bureau of Justice Statistics, 1993:603.

As can be seen in Table 11, women prisoners are more likely to have been in drug treatment program prior to and during incarceration than men prisoners. More than one-

third of female inmates receive drug or alcohol counseling following admission (Survey of State Prison Inmates, 1991:10), and women are more likely than men to participate in treatment. Nonetheless, based upon the increased use of major drugs and the greater likelihood of women to use drugs regularly, this appears to be a growing problem among female correctional populations.

Table 11. State Prison Inmate Participation in Drug Treatment Programs, by Gender, 1991

Participation in Treatment	% Inmate Participation in Drug Treatment		
	All Inmates	Male	Female
Ever Participated in Drug Treatment	43.2	42.8	50.5
Since Admission	32.7	32.5	37.7
Before Admission	21.0	20.5	28.6
Number of Times			
1	12.4	12.1	16.2
2	4.6	4.5	6.0
3-5	3.0	2.9	4.8
6 or more	0.8	0.8	1.3
In a Program in the Month Before Current Admission	6.6	6.5	9.1
Most Recent Treatment was while Incarcerated	35.6	35.3	40.2
Currently in Treatment	13.4	13.0	20.7

Source: Tracy L. Snell, *Correctional Populations in the United States, 1991*. Washington, D.C.: U. S. Department of Justice, 1991:37.

In addition to educational and vocational programming and substance abuse treatment, there are two areas of need that are particularly acute for women -- medical services and parental responsibilities.

Medical services and health care. Over the past ten years there has been a growing

awareness of the problem of gender discrimination in the correctional system. Attempts to address this issue have led to disagreement over the degree to which correctional policies, programs, and services should be gender neutral. The trend has been toward establishing parity of services (Chapman, 1980:147-165; Rafter, 1992a:185). However, the goal of parity is easier to pursue in some areas than in others. One area that is particularly problematic is that of medical services. The American Correctional Association Task Force (1990:43) recommendations on future policy for female offenders acknowledged that "health service requirements are obviously different for men and women."

One of these obvious differences is in the need for gynecological and obstetrical care. Eight to 10% of women who enter prison are pregnant and 15% are post-partum (National Women's Law Center, 1993:2). However, 14% of these women did not receive an obstetrical examination upon entering prison, and 30% did not receive any prenatal care (Survey of State Prison Inmates, 1991:10). Furthermore, 15% of state prisons for women fail to provide regular on-site prenatal/post partum care and 22% do not provide regular on-site gynecological and obstetrical services (ACA, 1990:32). Demographically, female inmates are more often low income and non-white. Behaviorally, they have a high probability of using or being addicted to alcohol and drugs and a sexual history of multiple partners. These characteristics place incarcerated women at high risk for prenatal and post partum difficulties, and make medical and health services that address these problems particularly important for women in jails and prisons.

Additionally, these behavioral and demographic characteristics increase the risk of incarcerated women for contracting communicable diseases like tuberculosis and

HIV/AIDS. A joint study by the National Institute of Justice and the Centers for Disease Control and Prevention (Hammett, et.al., 1994:19) on the prevalence of HIV/AIDS infection among correctional populations has also concluded that the characteristics and needs of female inmates are different from those of males and recommend "that specific attention should be given to services for women in correctional facilities, including those educational, medical, and psychosocial services related to HIV disease."

HIV/AIDS and Female Inmates. HIV-infection is spreading more rapidly among women in American society than among men. The number of women who contracted AIDS increased 9% from 1991 to 1992 in comparison to a 2% increase in the number of men (Hammett, et.al., 1994:12). AIDS is disproportionately prevalent among minority women. While only 20% of all women in the United States are black or Hispanic, 74% of all women with AIDS are black or Hispanic. HIV is also particularly concentrated among low-income groups.

Partly because of the disproportionately high number of minorities in jails and prisons and partly because of the high risk behavior engaged in by offenders, the rate of HIV-infection is higher in correctional populations than in the general population. In 1992, the incidence rate per 100,000 of the general population was 18. The median incidence rate for the same period in state and federal prisons was 195 and 176 in jails. The aggregate incidence rate was 362 and 176 for prisons and jails, respectively. It is estimated that 2.3% of all state and federal prison inmates are infected with HIV (Hammett, et.al., 1994:26).

Male inmates have higher incidences of AIDS infection and AIDS-related deaths

than female inmates because of their larger population size. In fact, the number of AIDS cases and deaths are proportional to gender stratification in total prison populations, 94% male and 6% female. Nonetheless, women in prison are at particularly high risk for HIV-infection, and rates of HIV seroprevalence are higher among incarcerated women than men. A sample of incoming inmates in ten jail and prison systems found 5.2% of women under 25 tested positive for HIV in comparison with 2.3% of men. Similarly, a 1991 inmate survey reports that 3% of female inmates in comparison to 2% of male inmates were seropositive (Hammett, et.al., 1994:19).

There are several reasons why incarcerated women are probably at higher risk for this disease. First, female inmates are more likely than male to be intravenous drug users. Second, exchanging sex for drugs or money, behavior that is often engaged in by both male and female inmates, may be more risky for women because HIV is transmitted more readily from males to females than from females to males. Recent statistics suggest that exposure to AIDS from heterosexual contact and through perinatal transmission is increasing more rapidly than exposure through male homosexual contact. Half of all women infected with AIDS acquired it through intravenous drug use and 36% through heterosexual contact. Thus, these findings suggest that incarcerated women are at higher risk for AIDS than incarcerated men. A sample of female inmates in New York city who used drugs revealed that 46% had exchanged sex for either drugs or money and of those, 20% tested positive for HIV (Hammett, et.al., 1994:12-19).

Additionally, The National Women's Law Center (1993:2) reports that the rate of HIV infection among male inmates in New York is between 2.1% and 7.6% while for

females it ranges between 2.5% and 14.7%. Another study in New York found 19% of female inmates infected with HIV in comparison to 17% of the male inmates .

Partly as a result of the growing HIV/AIDS epidemic, women prisoners are also at high risk for tuberculosis which has reappeared in a more virulent form since the existence of the HIV virus. Tuberculosis is becoming an increasingly serious health problem for all inmates and staff of correctional institutions. It is unknown exactly how prevalent the disease is among correctional populations. However, a recent survey sponsored by the National Institute of Justice found that 10% of male inmates and 11% of female inmates in responding jails and prisons were infected with tuberculosis (Hammett and Harrold, 1994:xii). Given the higher rate of HIV-infection among women prisoners, and the slightly higher rate of tuberculosis, it is reasonable to expect that these diseases will continue to grow more rapidly among incarcerated women.

Awareness surrounding the growing spread of HIV/AIDS among inmates has resulted in more institutional programs educating inmates about prevention and control. Many of these programs address issues that are specific to women such as prenatal transmission and choices regarding pregnancy. Although inmate education programs are improving, there is still a need for staff training to include HIV/AIDS education. With the assistance of outside agencies, a number of women's institutions have developed HIV/AIDS education program for inmates. While many of these projects are exemplary, the need still exists for more widely available programs and services to address this problem. A survey conducted in 1992-1993 found that two-thirds of state and federal institutions and 90% of jails still fail to provide peer HIV education and support groups



for inmates. Furthermore, education is only one tool in preventing and controlling this disease. The behaviors that place inmates at risk for AIDS are deeply rooted within normative and relational structures that require aggressive intervention. Only 20% of state institutions have evaluated the effectiveness of their programs and most of those evaluations have been methodologically flawed (Hammett, et.al., 1994:41). Without properly conducted evaluation studies, it is impossible to design meaningful and effective intervention programs.

In addition to the problem of HIV/AIDS infections, a second issue that is of particular concern for female inmates is that of separation from their children and anxiety and concern over the care of their children while they are incarcerated.

Separation From Children and Parenting Needs. Currently, 79.1% of women in prison are mothers, and 72% of them have legal custody of their children. As Table 12 reveals, women inmates are more likely than male inmates to have children, particularly dependent children, they are more likely to have lived with their children prior to incarceration, and they are more likely to return to living with their children upon release.

As can be seen, families of inmates mothers are more likely to be disrupted by incarceration. Only 22% of children of inmate mothers live with their fathers in comparison to almost 90% of the children of inmate fathers who are in their mother's care. An American Correctional Survey found that 26% of incarcerated women lived alone with their children prior to incarceration, and 52% identified their child or children as being the "most important person in my life" (ACA, 1990:49, 54). A study conducted by Smith College School of Social Work on the legal issues confronting female offenders found that

inmate mothers rank family and child issues as their most important concern. Correctional administrators, when asked to compare the legal needs of male and female inmates, also ranked this issue as having low priority for male inmates but high priority for female inmates (Gabel, 1982:56, 65).

Table 12. Children of State Prison Inmates, 1986

<u>Characteristic</u>	<u>% of State Prison Inmates</u>	
	<u>Female</u>	<u>Male</u>
Have children	76.4	59.6
Under 18	67.5	54.4
Number of children under 18		
1	31.7	42.2
2	28.7	27.8
3 or more	39.5	29.9
Lived with child(ren) prior to incarceration		
Yes	78.0	50.5
Had legal custody prior to incarceration	84.9	46.9
Since arrest, court placed child(ren) in custody of others		
Yes	28.3	17.0
No	71.7	83.0
Where dependent child(ren) now resides		
Child's mother/father	22.1	88.5
Maternal grandparents	45.4	5.8
Paternal grandparents	7.7	4.7
Other relative	22.1	2.7
Friends	3.4	0.4
Foster home	8.9	1.3
Agency/institution	1.6	0.4
Other	4.3	1.8
Plan to live with child(ren) upon release		
Yes	85.2	51.9
No	10.9	36.7
Don't Know	3.9	11.3

Source: Adapted from Lawrence A. Greenfield and Stephanie Minor-Harper, "Women in Prison," Bureau of Justice Statistics/Special Report, Department of Justice, 1991:6.

Since women are more likely to have lived with their children prior to incarceration and plan to return to their children upon release, they experience considerable anxiety and stress over their children's care and well-being during incarceration. Many fear that, when released, they will be unable to regain custody or will be rejected by their children. Furthermore, their sense of loss and loneliness over being separated from their children is particularly great. Women who give birth in prison or gave birth shortly before entering prison have additional pains of separation and loss, as well as concerns over bonding. Furthermore, many drug or alcohol-dependent women, who are off drugs while in prison, must cope with an increased awareness of the pain their previous behavior has caused their children. Many of these women had poor parenting skills before entering prison. They often neglected their children and now have to deal with guilt, loss of self-esteem, and anxiety over whether they will be able to reconnect and assume a parental role upon release. Some states automatically label a woman sentenced to prison as an unfit parent, charge her with abandonment, and initiate custody proceedings (Leonard, 1983:51-52). Despite the importance of this issue for female inmates, however, in 1991, only 14% participated in parenting classes (Survey of State Prison Inmates, 1991:10). Counseling and education programs for women must address these concerns with more emphasis and specificity than comparable programs for men (Fabian, 1979:23-24; Chapman, 1980:119-133; Gabel, 1982:53-54; Greenfield and Minor-Harper, 1991:6-7; National Women's Law Center, 1993:3; Fox and Stinchcomb, 1994:475-476).

In a paradoxical way, the needs of incarcerated men and women are, like the needs of men and women in the outside society, similar yet, at the same time, different.

Conditions that appear equal in form may still be inequitable in substance (Rafter, 1992b:17). The level of medical care that is adequate and available for men may not be adequate for women, even if equally available. The level of visitation and family contact that is considered fair, just, and humane for men may be unjust, unfair, and inhumane for women who are more often more closely connected to and responsible for the daily care and nurturing of their children, and, thus, feel their separation and loss often more grievously.

Because the conditions of confinement are different, and the concerns and needs of women in prison are different, the adaptive responses of men and women to incarceration are also different. It has been well documented that men resist the pains of imprisonment by creating an inmate social structure characterized by violence and domination in order to achieve control over their environment. This behavior manifests itself through the use of riots as an indirect internal mechanism of achieving reform, and the use of litigation as a direct and external mechanism for assuming control and alleviating stress (Sykes, 1958; Clemmer, 1958; Goffman, 1961).

Women, on the other hand, adapt to the psychological pains of imprisonment by creating a 'substitute universe' of roles and behaviors that provide emotional support and release and interpersonal connectedness (Giallombardo, 1966; Burkhart, 1973). Riots are uncommon modes of expressing demands for change (Gibson, 1973:227; Lown and Snow, 1980:206; ACA, 1990:43, Champion, 1990:464; Fox and Stinchcomb, 1994:478). Similarly, women rarely used litigation and the courts as a vehicle for voicing their needs and demands (Lown and Snow, 1980:200; Alpert, 1978:315-316; Rafter, 1989:96).

According to Rafter (1989:96), the non-violent and non-litigious nature of women's institutional behavior makes gender discrimination in corrections a difficult problem to resolve. However, the success of the prisoners' rights movement in increasing the receptiveness of the courts to inmates' claims has encouraged incarcerated women to look to litigation as a solution to problems of unequal correctional conditions, opportunities, and treatment. While litigation may solve some of these problems, its use may prove to be a double-edged sword in terms of whether such legal reform will ultimately be advantageous to incarcerated women (Fabian, 1979; Herbert, 1985; Rafter, 1989:95; Daly, 1990).

As shown in this chapter thus far, the issue of gender equality has underscored the historical development of women's prisons. In the nineteenth century, women in prison received inequitable and inferior treatment because of their small population, the limited economic return from their labor, and because of cultural beliefs that women criminals were less reformable than male offenders (Rafter, 1989). Reformers successfully changed this belief and replaced it with one that defined women as more reformable than men but as possessing special needs that necessitated different correctional treatment. While this facilitated the establishment of a separate correctional system for women, it also reinforced the legitimacy of an institutional model as an appropriate response to female crime and perpetuated gender inequities within corrections.

As female correctional populations grow, their needs and conditions of confinement attract increasing attention. Particular concern has centered around inequities in the number and quality of correctional facilities, programs, and services available to

women in comparison to men. In contrast with reform efforts at the turn of the century that sought relief for women inmates by arguing their special needs, contemporary reforms have challenged gender inequities in corrections through litigation demanding equal treatment or parity (Rafter, 1992a:185). The last section of this chapter will examine the growing use of litigation by female inmates as a vehicle for correctional reform; and the dilemma posed by seeking to achieve gender equality through legal arguments based on either parity or the special needs of incarcerated women.

#### The Use of Litigation by Female Inmates

As previously discussed, the repeal of the "hands-off doctrine" opened the doors of the court to inmate grievances over issues ranging from general prison conditions to procedural rights and administrative policies. This chapter has shown that women inmates have a broad spectrum of both general and sex-specific issues that could be legally challenged; yet, the vast majority of prison litigation has been filed by male inmates (Singer, 1979:338; Lown and Snow, 1980:200; Alpert, 1982:38; Alyward and Thomas, 1985:267).

Two analytically distinct types of explanation have been developed to explain this difference. The first views women as less litigious than men because of gender differences, whether innate or acquired through socialization, in aggression, temperament, and political consciousness and activism. As a result, litigation, as a means of exerting power and control over one's environment through demanding legal reform, is more consistent with men's adaptive response to incarceration than it is with women's. This explanation postulates that women inmates focus more of their energies on relationships as a way of

coping with the stresses and losses imposed by imprisonment and less on political activism (Alyward and Thomas, 1985:269-270; Rafter, 1989:96; 1992a:197).

The second explanation is that, organizationally, women's institutions may provide more structural control over inmate behavior which limits resistance to correctional treatment. The higher level of interaction with staff fosters an emotional dependency on staff. This, combined with the limited availability of law libraries and legal assistance in women's prisons, may pose more barriers to litigation by female inmates. Less access to legal resources also means that women prisoners have less access than men to role models and mentors in conducting legal research and writing briefs. As a result, they have had less opportunity to develop the prison role of "jailhouse lawyer,"<sup>9</sup> which is a well-established role in men's prisons. (Chapman, 1980:156; Alyward and Thomas, 1985:270-272; Rafter, 1992a:97).

It is not clear from the research and literature why women have begun to litigate, but it is possible to speculate on this. It may be that rising incarceration is straining institutional facilities and services and motivating activism. Of the 242 facilities under court orders or consent decrees for specific confinement conditions in 1990, 186 were for overcrowding (Sourcebook, 1992:113). If overcrowding is a serious problem in corrections, it is reasonable to assume that with fewer female institutions and rising female incarceration that it poses a problem for women prisoners.

It could also be that rising educational levels among inmates makes litigation a

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<sup>9</sup>A jailhouse lawyer is an inmate who has learned how to write writs and do legal research on his own behalf and for other inmates for a fee.

more viable response to prison conditions, particularly in view of the success male inmates have had in achieving legal reform. Recent statistics suggest that the level of educational attainment among female inmates is growing. The percentage of women inmates who had completed high school and had some college increased from 38.9% in 1979 (Greenfield and Minor-Harper, 1991:2) to 58.4% in 1991 (Snell, 1991:26).

It is also possible that the increasingly litigious nature of American society is being imported into the microcosm of the prison. Or, that litigation based on gender discrimination in removing sex-specific sentencing statutes and discrimination in other areas of American life has motivated and encouraged incarcerated women (Fabian, 1979:10; 1980:175).

Whether it is for some or a combination of all of these reasons, women have begun to challenge the conditions of their confinement. In 1983, 23 states were under court decree or pending legislation regarding the conditions affecting female prisons (Rafter, 1989:23). One year later, in 1984, this number rose to 27 (National Institute of Corrections, 1984:xii).

Rafter (1989:96) has divided the use of litigation by female prisoners into two overlapping stages. The first stage encompasses the time period of the 1960's through the 1970's. It was during this period that litigation was first used successfully to challenge sex-specific sentencing statutes and that the trend toward women prisoners seeking equal treatment to men began to develop.

Prior to the 1960's, differential treatment on the basis of gender was supported in statute and by the judiciary if there was a "rational basis" for the discriminatory



classification. Dating back to 1919, in the case of State v. Heitman (105 KAN. 139, 181 P. 630), the court refused to invalidate an indeterminate sentencing statute that only applied to women on the basis that the differential sentencing was justified by gender differences in correctional and rehabilitative needs. In the opinion of the court, whether gender differences were created by nature or society was irrelevant since "the result is a feminine type radically different from the masculine type, which demands special consideration in the study and treatment of nonconformity to law" (Fabian, 1989:42).

This principle of legally justifiable discrimination for rehabilitative purposes or concerns had been supported in a series of cases that followed Heitman. However, two cases in 1968, US ex rel. Robinson v. York (281 F.Supp. 8 (D.Conn. 1968)) and Commonwealth v. Daniel (430 Pa. 642, 243 A.2d 400 (1968)), successfully challenged the "rational basis test" for discriminatory sentencing statutes. Although the application of the Daniel case to other states with such statutes was uneven, the door was opened for further court challenges to inequitable correctional policies and practices. By the end of the 1970's, the scope of a prison litigation by female inmates became broader and a new era of litigation began (Fabian, 1979:32-43; Rafter, 1992a:197).

The second stage, which encompasses the 1980's to the present time, has introduced cases challenging general prison conditions and the due process rights of those confined. Litigation has centered mainly around issues of inmate rights regarding transfer to other institutions that are farther away from home and family; access to opportunities for work release; general prison conditions that include physical conditions of confinement; as well as the nature and type of rules and regulations female inmates are

subject to (many of these cases have included integrated class action suits with male offenders rather than specifying sex-specific discrimination); and parental rights and visitation issues (Fabian, 1979:45-46; Chapman, 1980:147-165; Rafter, 1989:96).

Legal Basis for Litigation by Female Prisoners. The use of legal reform by prisoners to mitigate prison policies and conditions has been based primarily on constitutional rights guaranteed in the 8th and 14th amendments, and in section 1983 of the Civil Rights Act of 1871. Section 1983, which gives inmates the right to sue state officials who violate their constitutional rights, and the 8th amendment, which prohibits cruel and unusual punishment, have been the basis for considerable prison litigation filed by male inmates (Turner, 1979:610-612; Alpert, 1982:39). The 14th amendment establishes the right to equal protection under law, and it is this right that female inmates are more likely to demand through the courts (Fabian, 1979:34; Chapman, 1980:148; Leonard, 1983:47). The legal definition of equal protection of the law is the following:

The constitutional guarantee of 'equal protection of the laws' means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness...Doctrine simply means that similarly situated persons must receive similar treatment under law (Black, 1990:537).

As this definition indicates, differential treatment of women does not automatically violate female inmates' constitutional rights (Arditi, 1973:1244). Equal protection demands would be less effective if used to challenge internal conditions that differentiate one inmate from another, such as differences in pay or work assignments. However, if inmates can demonstrate that inequities in pay or work assignments, or any other correctional services, programs, or policies are being experienced as a class based on

gender, the legal basis for an equal protection challenge exists (Rafter, 1989:96-97). As a result, it has fallen to the courts to review the underlying rationale for the differential treatment or conditions to determine whether inmates rights are being violated (Fabian, 1979:34).

Standards for Court Review. The courts have traditionally utilized three different levels of review in order to determine whether gender discrimination in corrections has met the standards required of an equal protection challenge. These standards are: (1) the "rational basis test," (2) intermediate scrutiny, and (3) rigorous strict scrutiny (Fabian, 1979:34-36; Chapman, 1980:148-149; Bershad, 1985:390-401; Herbert, 1985:1185-1186).

Rational Basis Test. Legislation may distinguish between different classes of persons when a rational basis that justifies the classification exists. A legal challenge to legislation based on a neutral classification, one not based on race, ethnicity, sex, alienage, illegitimacy, is subject to rational basis review. The standard for this level of review is whether the classification of "similarly situated males and females" (Bershad, 1985:393) maintains a "reasonable relationship to a legitimate legislative purpose" (Herbert, 1985:1185-1186). The burden of proof is on the plaintiff to establish that legislation is without a rational basis or is unrelated to achieving a valid purpose. Since this is not a difficult standard to meet, legislation based on gender discrimination has rarely been challenged successfully using the rational basis test (Bershad, 1985:392; Hinck, 1989-90:230).

Intermediate Scrutiny. Gender classifications were only subject to a rational basis

test until 1971 when the United States Supreme Court ruled in Reed v. Reed (404 U.S. 71 (1971)) that allowing preferential treatment to one sex that is not afforded to the other was arbitrary. Rather than just a rational basis, the court ruled that classification based on sex must have a "substantial relation" to legislative intent and not be based solely on administrative convenience. Through this ruling, the decision in Reed enabled a higher standard than rational basis to be applied in reviewing sex discrimination cases (Fabian, 1979:34-35; Bershad, 1985:392-393). The implication of this ruling for female inmates was that inequitable treatment can only occur if the state can demonstrate a "meaningful and objective justification" for the inequities.

Strict Scrutiny. In 1973, the ruling in Reed, which provided the basis for establishing gender, along with race and ethnicity, as a suspect classification, was used in Frontiero v. Richardson (411 U.S. 677 (1973)). A "suspect" classification is one that is without rational purpose and, thus, is subject to "strict scrutiny" (Fabian, 1979:34; Bershad, 1985:393; Herbert, 1985:1188). Under this level of review, classification or discrimination based on gender is only constitutionally valid if three criteria are met. First, there must be a rational basis for the classification or discrimination. Second, it must be necessary in order to achieve a compelling state interest. Third, there must be "no less burdensome alternative... available to achieve the governmental objective" (Bershad, 1985:393).

Philosophical disagreement developed over whether the standard established in Reed or the more rigorous scrutiny established in Frontiero should be applied to cases involving sex discrimination. This disagreement was resolved several years later in Craig

v. Boren (429 U.S. 190 (1976)) which provided a more clearly defined standard of intermediate scrutiny than that used in Reed. According to Hinck (89-90:231): "An intermediate level of review was developed for groups that meet at least one, but not all three of the requirement of suspect class statutes. These groups are sometimes termed 'quasi-suspect classes.'" It was soon apparent that this would be the standard applied to equal protection litigation filed by women prisoners (Fabian, 1979:34-35).

The test adopted in Craig v. Boren lies between the rational basis test and the strict scrutiny test. It states that gender discrimination does not violate equal protection rights if it is for the purpose of achieving an important state objective and if gendered classifications are "substantially related" to realizing that objective (Ginsburg, 1978:143; Herbert, 1985:1187). The significance of the use of this review standard for female inmates is that it allows courts to invalidate statutes or correctional practices that are based solely on gender stereotypes or administrative convenience. The focus for the court then becomes whether male and female inmates are "similarly situated" in order to determine whether female inmates' equal protection rights are being infringed upon. This does not mean, therefore, that differences in classification or punishment are automatically subject to the standards of intermediate review. If it is determined that male and female inmates are not similarly situated due to legitimate differences, such as differences in need for punishment or protection, sex-specific policies or practices are still reviewed under the rational basis test. Although intermediate scrutiny provides a "logical framework" (Bershad, 1985:393-394) for the courts to review gender discrimination within the justice system, it will not eradicate inconsistencies and unevenness in court rulings, and, thus, in

correctional practices due to the individualized, case-by-case nature of judicial review.

Differential treatment can still exist under intermediate scrutiny if correctional systems can provide proper justification for the disparities (Arditi, 1973:1249-1251).

Whether applying a rational basis test, intermediate review, or a strict scrutiny standard, courts are still balancing the interests of the state against the constitutional rights being abridged to determine whether discriminatory classifications employ reasonable means for accomplishing the objectives of the policies or practices in question (Chapman, 1980:165). It is this limitation, and the ability of the state to still argue an important or compelling state interest or objective in maintaining disparate conditions, that has caused some scholars to question how complete the relief offered by equal protection theory is for incarcerated women (Arditi, 1973:1253; Fabian, 1979:36; Herbert, 1985).

The intermediate review standard makes courts more accessible for an equal protection challenge by female inmates, but courts may only provide a partial solution (Bershad, 1985:390). Under existing legal theory, equal protection relief can only provide female inmates with parity of treatment. Parity has been a somewhat elusive and weakly defined concept (Herbert, 1984:1195-1196). It is defined in Black's Law Dictionary (1990:1115) as: "Equality in amount or value," but its definition is derivative from the pricing of goods and services in a market economy not from human relations. Its application to gender discrimination in prison litigation has developed from the legal interpretation of "equal protection of the law." Equal protection of the law does not mean "identity of treatment, but only (1) that classification rests on real and not feigned differences, (2) that the distinction have some relevance to purpose for which classification

is made, and (3) that the different treatments be not so disparate, relative to difference in classification, as to be wholly arbitrary" (Black, 1990:537).

Parity of treatment, as a variation of this doctrine, was first established in Barefield v. Leach (10282 (D.N.M. (1974)): "[W]hat the Equal Protection Clause requires in a prison setting is parity of treatment, as contrasted with identity of treatment, between male and female inmates with respect to the conditions of their confine and access to rehabilitation opportunities" (Herbert, 1985:1195). This standard was more fully developed in Glover v. Johnson (478 F.Supp. 1075 (E.D. Mich. (1979)): "Defendants here are bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided men--i.e., equivalent in substance if not in form--unless their actions, though failing to do so, nonetheless bear a fair and substantial relationship to the achievement of the State's correctional objectives." (Herbert, 1985:1195).

According to Herbert (1985:1195-1196), "the concept of parity is a vague one; it has been defined only through conclusory examples or by negative implication...the phrases 'substantially equivalent' and 'equivalent in substance, if not in form' which are used to define parity...do little to clarify its meaning." Furthermore the courts have been inconsistent in their use of this standard by affirming parity challenges less often when they involve male plaintiffs as opposed to female.

It appears as though we know more of what parity does not mean than what it does mean. We know from Glover that parity does not mean identical. Herbert

(1985:1197) has criticized parity as a "less stringent version of a separate but equal test"<sup>10</sup> that both fails to ameliorate the harmful results of maintaining gender segregated prisons and to demand full equity. Parity offers little remedial authority to courts, nor does it require that an integrated system be introduced to correct inequities (Arditi, 1973:1253). Reliance upon a standard of intermediate review in inmate litigation has resulted in the courts only addressing issues of gender differences in access and availability of programs and services. As a result, the courts can only require parity rather than "examining the purposes behind the decision to segregate the sexes and the relationship of absolute separation to the attainment of those purposes" (Herbert, 1985:1182).

Herbert (1985:1198) speculates that the reluctance of courts to subject the issue of gender segregated prisons to more rigorous review is a carry-over of the hands-off policy which assumed that correctional authorities were more knowledgeable about correctional operations and security needs than were judicial authorities. Her solution is that the courts either adopt a standard of strict scrutiny or more rigorously apply intermediate scrutiny in examining the constitutionality of gender segregated prisons. She believes that parity of treatment is an inadequate means of providing female inmates with equal protection rights. Instead, she (1985:1206) calls for "wholesale structural reform: the implementation of a full desegregation plan. Only through shared facilities can women expect equal access to prison services and rehabilitative programs currently available to men."

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<sup>10</sup>Separate but equal doctrine was established in 1896 in Plessy v. Ferguson (163, U.S. 537 (1896)) when the Supreme Court failed to recognize harm to black Americans resulting from statutory segregation if the facilities available to blacks, although separate from whites, were equal. Herbert (1985:1197) compares parity to this doctrine because it fails "to recognize harms resulting from the process of segregation itself."



Other scholars (Fabian, 1979; 1980; Bershad, 1985; Rafter, 1992a, 1992b) have also questioned whether parity is the most appropriate objective for female offenders. Issues relating to family ties, child care, privacy and medical care may be more appropriately addressed with a review based on the particular needs of female inmates. According to Bershad (1985:437), parity demands are "risky, expensive, and needlessly wastes time and resources that could be used more productively to bring about reform...reliance on litigation in this area is misplaced given the ever-changing philosophies and orientations of the judiciary toward women."

While scholars may agree that legal reform based upon parity is problematic, they do not necessarily agree upon the solution. Herbert (1985:1182) has questioned whether equal protection is possible in a segregated system and calls for a co-correctional system. Fabian (1979:60) has also questioned whether parity demands are in women's best interest and suggests greater use of alternative sentencing and a deinstitutionalized model.

The question of whether legal reform based on parity is in the best interest of incarcerated women is linked to broader questions surrounding the issue of women and the law. Feminist legal scholars (Smart, 1989; Binion, 1990; Carlen, 1990; Rhode, 1991; Villmoare, 1991) have been divided over this question of whether the needs of women, are best served by legal remedies to discrimination that seek to establish parity, or by remedies based on the special needs of women.

#### Parity v. Special Needs.

There has been considerable analysis by feminist scholars over the legal meaning of equality and how to operationally define equality within the framework of existing

jurisprudence (Epstein, 1988:121-131; Daly, 1990:7; Binion, 1991:208; Rhode, 1992). A debate has emerged over whether gender equality is more likely achieved by establishing laws that are gender neutral or that recognize gender differences where appropriate distinctions exist (Smart, 1989; Carlen, 1990; Villmoare, 1991:393-398; Rhode, 1991). This has been referred to as the "sameness/difference debate," the "equal/special treatment debate," or the "needs/rights debate" (Daly, 1990:10-12).

Binion (1990:209) has framed this question as one that distinguishes between the content of law in seeking equal treatment versus the substance of law in which concern focuses around the impact of law on public policies. She has identified three stages of legal strategies or arguments that have developed out of feminists' efforts to address the relationship between gender differences and the law.

The first stage is characterized by a concern over the content of law and sought identity of treatment for males and females across a wide range of cases that addressed gender discrimination. The legal remedy being sought for such discrimination was an end to gender-based classifications and the demand for laws that treated men and women the same without reference to gender differences. This argument developed out of concern over correcting the restrictions and disadvantages that relegated women to "separate spheres" and reinforced institutionalized sexism through the enactment of sex-specific legislation that "protected" the special needs of women. At the turn of the century, it was a recognition of what were considered to be valid gender distinctions, i.e., that women were physically, psychologically, or morally inferior to men and, thus, requiring supervision and protection, that were used to legally justify the social, political, and

economic subordination of women to men. This history has led many feminist legal scholars to reject any classification based on gender and strive for attaining formal rights that are gender-blind (Binion, 1990:212-213).

Yet, while seeking to establish laws that treat men and women equally, these arguments often ignored that establishing formal rights that are gender-blind, or even gender-neutral, does not ensure that their practical application in a gendered social structure will have equal impact on men and women and achieve gender equity. Analysis has revealed that informal, cultural barriers are not eliminated through the attainment of formal rights. Gender stereotypes are highly resistant to change. Even when formal barriers are removed, women find they must accommodate their values, situation, and experiences to an institutional structure that was created to reflect male values, situation, and experiences. Despite making many gains through the achievement of formal rights, women are still underrepresented in the professions, and in upper-level administrative and managerial positions (Smart, 1989; Daly, 1990; Rhode, 1991).

This awareness led to a second stage of legal arguments that postulated that in order for law to have equal impact in its application, valid gender distinctions, in specific areas, must be recognized. Under this argument, legal remedies would not be used to eliminate gender-based classifications. Instead, such remedies would be used to subject gendered classifications to a higher standard of review—one that considered the impact of such classifications on reducing the opportunities and options available to women. The problem presented is two-fold. First, there is the difficulty that exists in getting the U.S. Supreme Court to adopt a standard of stricter scrutiny that examines the impact of law on

public policy. Second, there is the problem of whether equality is operationally defined as seeking sameness (equal in treatment or form) or recognizing difference (equal in substance). This question reflects the core of the dilemma of whether law should be based on rights or needs (Binion, 1990:210-211; Daly, 1990).

Some scholars (Smart, 1989; Rhode, 1991) have expressed concern that the attainment of formal rights has led many to deny that a gender problem exists. Instances of gender inequality are perceived as due to individual failure of women to successfully improve their situation or as a consequence of cultural lag rather than institutionalized discriminatory policies. Concern has developed over whether law is able to redress the social realities of women's lives, such as the devaluation of women's work, or the problems that stem from women accommodating male-dominated institutional structures (Rhode, 1991; Villmoare, 1991). From this perspective, rights-based claims are viewed as important, yet, unpredictable in outcome and capable of being used against women as well as for women (Smart, 1989). As a result, the discourse over sameness versus difference, and rights versus needs, is beginning to shift to one of advantage versus disadvantage.

Rhode (1991:1790-1791) has called for legal "strategies that neither glorify nor discount difference, but that challenge its adverse consequences...to affirm our gender identity and to challenge its constraints, to claim solidarity and to acknowledge diversity. The sameness/difference dilemma cannot be resolved; it can only be reformulated." The problem that exists, therefore, is how gender differences can be acknowledged and validated without perpetuating the gender inequality that often stems from recognizing such differences. Scholarly (Smart, 1989; Rhode, 1991:1755; Rafter, 1992b:19;

Villmoare, 1991) literature has cautioned that any discourse on equality must address the structural limitations imposed upon such legal analysis by the androcentric nature of law. It has been argued in this literature that law has been created by and for a male-dominated society, and, as such, reflects the masculine experience and a gendered hierarchy of power and status. In American jurisprudence, equality is a relational concept measured against a male normative standard. Any attempt to use the law to change existing political, economic, or social structures to provide justice and equality for women must address the implications of selecting one form of legal analysis over another in terms of its consequences for improving the situation of women. Legal theory and strategies can only provide limited solutions to structural differentiation and inequities.

It has been argued that the use of legal reform keeps law centered as a privileged discourse and accepts the legitimacy of a masculine world view (Smart, 1989). Some feminist legal scholars (Cornell, 1991; Smart, 1989; Villmoare, 1991) believe that this can work against, as well as for, the needs and experiences of women, and have, therefore, adopted a deconstructionist approach that rejects the centrism of law as a privileged discourse. From this perspective, it is held that neither arguments based on gender equality nor on gender differences can eradicate institutionalized sexism. Therefore, if justice for women is to be realized, law must be redefined toward a new paradigm based on a broader conceptualization of social justice.

### Conclusion

This chapter examined the history of punishment of women and the development and use of prisons in modern society, specifically the women's prison. The correctional

needs and problems of female inmates and the use of litigation to solve these problems were also examined. It concluded with a discussion of the debate over the efficacy of legal reform in eliminating structural inequality in a gendered social order.

Although most of this debate has occurred at an academic and theoretical level, with practical application existing primarily in the areas of employment, the issues it raises are particularly relevant to women offenders in the criminal justice system. The needs of women in prison are similar to, yet different from those of men in prison. As women look increasingly to the courts to litigate gender inequality within corrections, the question arises as to whether legal arguments should be based upon demands for equal rights, emphasizing 'sameness,' or on demands for special rights, emphasizing 'difference.' Even more essential is the question of whether the courts and the law, which have been created out of a male world view, are capable of responding to female needs and life experiences in a way that is meaningful and advantageous to women

Feminist legal scholars have warned that traditional legal arguments and remedies often fail to bring about meaningful and equitable changes in the situations of those on whose behalf legal reform was initiated. Under existing legal theory, the remedy courts can provide for gender disparities in correctional treatment is to order parity of treatment. There are times when this benefits women and times when it is disadvantageous.

Rafter (1989:102-103) predicts that a parity solution to the correctional problems of women could result in overuse of incarceration and risks a generalized lowering of correctional standards. Daly (1990:18-19) has also expressed concern that an "equality ethos" can provide a justification for building more prisons for women which will result in

increased incarceration, particularly of black women. This concern is particularly valid--in 1983, 50.4% of female inmates were white (National Institute of Corrections, 1983), but in 1991, despite rising correctional populations, this had dropped to 36.2% (Snell, 1993:26). Similarly, Fabian (1980:175-176) has observed that legal demands for equal treatment by female inmates have not only failed to expand their rights, but have, in some cases, resulted in a backlash of retaliatory treatment.

Daly (1990:8) questions the ability of legal reasoning and the existing legal framework to erase a history of gender, class, and racial relations that is rooted in domination and subordination. She states (1990:10-11): "neither traditional forms of equality analysis nor rights-based claims are sufficient to the task of reducing inequality...formal legal equality of women with respect to men cannot provide substantive equality. Indeed, applying the traditional equality approach can result in a worsening of women's situation."

American and English jurisprudence defines equality in terms of equal measure. According to Black's Law Dictionary (1990:536), equal is defined as: "Alike, uniform; on the same plane or level with respect to efficiency, worth, value, amount or rights. Word 'equal' as used in law implies not identity but duality and the use of one thing as the measure of another." Similarly, equality is defined as: "The condition of possessing substantially the same rights, privileges, and immunities, and being liable to substantially the same duties. 'Equality' guaranteed under equal protection clause is equality under the same conditions and among persons similarly situated." The difficulty posed by these definitions is that they not only obscure the fact that a history of inequality cannot be

remediated or restored by introducing equal treatment from a given time forward, but they preclude this fact from legal consideration.

Women and men do not live in equal social worlds in the outside society. They do not bring equal needs into the prison. They do not exhibit equal adaptative responses to the deprivations and psychological pains of imprisonment (Sykes, 1958; Giallombardo, 1966; Burkhardt, 1973). As a result, gender inequality in society cannot be remediated by gender equality within a prison if men and women enter the prison with different correctional needs, and if correctional standards represent the lowest acceptable conditions for meeting men's needs.

Early reformers introduced a double standard of treatment for women that scholars now view critically as having contributed to unequal justice for women. Some contemporary scholars (Feinman, 1984, 1986; Freedman, 1992; Rafter, 1992a), have observed that correctional reform for female offenders has had unintended consequences. They criticize the contemporary women's prison for not providing incarcerated women with opportunities to acquire the types of educational and vocational skills they will need in order to be economically self-sufficient upon release. Moreover, they have been highly critical of the persistence of a correctional ideology that remains dominated by idealized "feminine" and domestic roles that are as divorced from the reality of inmates' lives today as they were a century ago when they were first formulated. As a consequence of this critique of women's corrections, many scholars (Herbert, 1985; Epstein, 1988; Daly, 1990) reject the argument that women have special needs that require differential treatment. From this perspective, special needs have become synonymous with



restriction, limitation, and protectionism (Rhode, 1991). They see full gender equality in society as achievable only if women demand and receive equal legal, social, and economic rights and opportunities (Ginsburg, 1978). A history of subjugation, blocked access to opportunity structures, exploitation, and domination that is rooted in paternalism and patriarchy and legitimated by gender stereotypes has created a wary attitude toward arguments asserting the special needs of women.

The social reality of the correctional history of women, when juxtaposed against more abstract concerns for achieving gender equality, poses a thorny dilemma. Asking for special conditions for women perpetuates a correctional system, and in a broader sense a social system, stratified by gender and characterized by differential treatment, opportunities, care, and conditions.

Yet, it remains that men and women do not enter the prison equally, nor experience its hardships equally. Adherence to long-range and abstract principles of social justice often comes as the cost of abandoning the short-term and immediate needs of women whose daily lives are affected by conditions that require melioration. The answer to this dilemma, if in fact one exists, cannot be easily found. It is certainly beyond the scope of this study to provide a solution. It is critical, however, that an analysis of the consequences of an equality ethos on women in corrections, and in the justice process as a whole, be informed by this discourse. Daly (1990:18-19) has identified a need for increased social science and legal research that collectively seeks to examine how legal remedies that seek equality actually impact justice policy. It is this issue that the remaining chapters of this study is concerned with addressing.

The New Hampshire State Prison for Women was created out of legal reform that challenged gender discrimination in the correctional treatment of women inmates and was based on a parity of treatment standard. The women who filed the lawsuit alleging gender discrimination were asserting their right to equal treatment with male prisoners--their right to a prison. It is only possible to speculate whether those inmates who demanded equal treatment with men would have sought solutions to their correctional problems other than litigation and legal reform had they been aware of the issues that feminist legal critique has raised. However, as Epstein (1988:99-101) has observed, claims can only be formulated within the choices that are known and available to the claimant. According to Epstein, individual choice is made from a selection of options that are socially created and patterned and institutionally ordered.

It is significant, therefore, that the choice made by these inmates occurred while they were incarcerated. Epstein has noted that structural conditions can be used to explain the development of subjective states like motivation since structure imposes both physical and normative barriers upon interaction and role behavior. Prisons represent the quintessential example of an institutional structure that is a controlled interactional setting. Institutions like prisons do not just reflect socially patterned behavior but help to create it. By understanding the processes embedded within organized social settings and the mechanisms by which patterns of interaction, information, and choice are framed within a structurally organized environment, it is possible to examine the ways in which choice, consent and even agency is constructed to serve institutional needs at the interest and expense of self-interest. With this understanding as a conceptual foundation, the

remaining chapters of this paper will examine the creation of a prison by its inmates.

It has been over 10 years since the lawsuit, Fiandaca v. Cunningham, was filed and almost five years since the New Hampshire State Prison for Women has opened. The question that arises is whether the correctional situation of women prisoners been improved as a result of its existence. An additional question is whether an equality ethos provides the most effective objective for reforming women's corrections. The next chapter will examine the correctional history of female felony offenders in New Hampshire and the conditions that led to creation of the women's prison. The question underlying the analysis that follows is whether legal reform based on parity has provided the most appropriate solution to the correctional problems of incarcerated women in New Hampshire.

## CHAPTER IV

### THE FEMALE FELONY OFFENDER IN NEW HAMPSHIRE AND THE CREATION OF THE WOMEN'S PRISON: SOME UNINTENDED CONSEQUENCES OF LEGAL REFORM

#### Introduction

This chapter will provide an historical perspective on the penal treatment of female offenders in New Hampshire from the seventeenth century to the opening of the women's prison in 1989. This chapter is not intended to be a history of women's penology. Such an undertaking would require a separate study in itself. Rather, its objective is to provide an historical context for understanding the attitudes toward women prisoners and the conditions of their confinement that developed over time and influenced contemporary correctional policy regarding women prisoners. The intention is to offer a contextual understanding for why New Hampshire did not construct a prison for women until so late in the twentieth century, and only then in response to a lawsuit compelling it to do so.

The literature on the history of women's prisons has been extremely limited (Pollock-Byrnes, 1990:4). Most of the vast body of extant correctional literature addresses the development, conditions, and characteristics of men's prisons. That which has been written on women has been relatively narrow in scope--providing a census or descriptive accounts of institutions, populations, conditions, and behavioral adaptations (Ward and Kassembaum, 1965; Giallombardo, 1966; Burkhardt, 1973; Glick and Neto, 1977). With one exception (Lekkerkerker, 1931), only recently have historical accounts

of the development of women's institutions appeared (Carlen, 1983; Zedner, 1991; Freedman, 1992; Rafter, 1992a). One explanatory factor may be the small female correctional population which has resulted in far less attention being focused on female prisoners (Simon, 1979:313; Pollock-Byrnes, 1990:25) and less information being recorded and maintained in relation to male prisoners (Rafter, 1992a:xxii). The limited availability of documents regarding the female correctional experience has been no less problematic to this research.

The historical and contemporary records of women prisoners in New Hampshire are particularly fragmentary and of very limited scope and depth. Their use in this study has often generated more questions than answers. Annual and biennial prison reports, legislative hearings and reports, board of trustee reports on charitable institutions, legislation and caselaw, administrative policies and manuals, and essays provide a depth of insight regarding the prison experience for men. However, there is only occasional, if any, reference to the women who were also confined. Women prisoners have been referred to as "forgotten" (Simon, 1979:313; Lown and Snow, 1980:195), but in New Hampshire it may be more accurate to characterize the female prisoner as invisible.

This research examined a wide variety of archival documents in an effort to understand the penal treatment of female offenders in New Hampshire. However, it does not offer an exhaustive search of all the documentation that may be in existence. Undoubtedly, there are additional records that could be uncovered in town and county archives and historical associations. For example, even Massachusetts court archives would provide a source of information since serious crimes in provincial New Hampshire

were brought to the Court of Assistants in Boston (Page, 1959:106). However, such a search would far exceed the needs and resources of this study. As a result, this research relied upon those documents that were more readily accessible in order to develop a preliminary understanding of the penal treatment of female offenders in earlier stages of New Hampshire's history. This information, although limited, is woven together in this chapter in an attempt to capture at least a glimpse of the correctional treatment of female offenders.

### Sources of Information

Court structures in New Hampshire have been traced to at least 1640 (Page, 1959:3), and an appropriation of public funds to construct a "prison"<sup>11</sup> occurred shortly thereafter in 1699 (Bouton, 1869). The first state penitentiary was constructed in 1811 (Robinson, 1897). The primary source of information for legal and penal sanction in the seventeenth and eighteenth centuries were Elwin Page's Judicial Beginnings (1959) and Jeremy Belknap's The History of New Hampshire (Volume I originally published in 1784 and reprinted in 1831; Volumes II and III were originally published in 1791 and 1792, and Volume III was reprinted in 1812; Reprinted in 1970 as Volumes I and II). The primary sources of information for the construction of the state prison were Henry Robinson's article "The New Hampshire State Prison" (1897) and Report of the Prison Commissioners of the State of New Hampshire for the Erection of a New State Prison to

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<sup>11</sup>Seventeenth century use of the term 'prison' is not synonymous with modern usage of this term. Prisons did not assume the penological characteristics of modern prisons until the development of the penitentiary in the late eighteenth century. Prior to then, prisons were used for detention and not for modern objectives of deterrence, rehabilitation, incapacitation, just deserts, or even retribution (Orland, 1975:19-47).

His Excellency the Governor and the Honorable Council, 1881. However, these sources provided limited information on the punishment of women.

In fact, relatively little additional information was found on the penal treatment of women until several years after the establishment of the state prison. It appears that 1832 was the first year in which a woman was confined in the state prison (Lewis, 1967:151). No further information is available until 1853 when some limited background information on female prisoners is found.

The sources of information on the correctional treatment of female offenders from the time the prison was opened to the present include the following: state prison reports from 1850 to the present; board of trustee reports on state institutions; legislative bills and/or studies pertaining to prison construction; special legislative or executive hearings and reports; public proclamations; assorted other administrative reports; personal essays; court documents pertaining to recent litigation over prison conditions; and a recent assessment survey of female inmates' needs.

Paradoxically, many of the contemporary sources of information were, in some ways, less satisfying--providing even less richness of detail than the historical documents. The style of preparing prison reports has become progressively more cryptic and factual. In the eighteenth and early nineteenth centuries, these reports often contained lengthy narratives expressing the official's personal views on crime, penology, and social reform which enhances the richness of these records. Additionally, reports from the 1850's until the 1920's provided some personal information on the women prisoners. Each included population figures categorized by gender and a registry that listed inmates by name,

offense, sentence, age, place of birth, and the county in which they were sentenced.

From the early 1920's until 1988, the information provided on women is less consistent and definitive. In many years it is unclear if there are other women under state sentence than those being referenced as held in a specific institution. In some years there is no mention of women at all even though there may have been women located in other institutions, and there is only one year when women confined to a county house of correction are listed. For example, there were at least 7 women confined at the Rockingham County House of Correction in 1983, the year of the lawsuit, but the Department of Corrections Biennial Report for 1982-1984 does not include any population data on women. Population figures for women prisoners are not included in these reports until the 1988-1990 biennial report which contains a brief report on the women's prison. As a result, for the purpose of research on female offenders, the earlier documents provide a richer and deeper understanding of correctional thinking and of the relationship between correctional philosophy and policy development than does the contemporary record.

Additionally, in the late nineteenth century, the State Board of Charities (later expanded to include Corrections) supervised state and county institutions. Their biennial reports have been maintained in a central repository which makes them readily accessible for research. These reports are an extremely informative source of information on the jails, houses of corrections, almshouses, and other county institutions that operated in New Hampshire in the early twentieth century.

Today, county agencies are no longer supervised by a state board of trustees but



by County Commissioners. Each County Commissioner's office maintains an annual report that consists of the individual reports filed separately by each department. As a result, these reports are less readily accessible and more inconsistent in the type, scope, and depth of information that is included. Furthermore, as new statistics are included in contemporary reports, other information is eliminated. As correctional populations have grown, the trend has been to provide less detail about specific inmates and offenders, and more statistical summaries of population characteristics.

Administrative reports that reduce information into statistical summaries--often omitting the very information academic research seeks--is still a less serious situation than that which occurs when information has not been summarily organized. Original records are frequently discarded after several years due to the lack of storage space. Therefore, any information not previously included in a report is completely lost. For example, the state prison destroys inmate records after 12 years (Personal communication, J. Wehrle, Bureau of Offender Records, NHSP, June, 1993). The limited offender information provided in biennial reports, and the destruction of prisoner records after several years, severely restricts the range of criminological research that can be conducted. Studies can be done with current populations, but the benefit of observing developmental or historical change and the ability to conduct a comparative analysis of social and criminal characteristics of offenders is lost. This problem was particularly evident in my efforts to locate court data for this study, which is discussed in the next chapter.

Although it was difficult to obtain information on female offenders and prisoners in New Hampshire, there was an unexpected advantage to not having access to readily

summarized data. The lack of summary information on how women are treated in the justice process provided an impetus and an opportunity to view documents in their "raw" state. This was particularly evident in the analysis of the court records presented in Chapter V and the court affidavits, depositions and correspondence presented in this chapter. These documents are more comprehensive and provide greater depth because they have not been summarized for administrative purposes. Thus, they provided a richer source of information which facilitated a hermeneutical approach.

Issues of Validity and Reliability. As discussed in Chapter II, archival records, particularly those gathered for administrative purposes such as crime statistics and prison and other administrative reports, are particularly vulnerable to problems of reliability and validity. Reliability is reduced by methodological differences between agencies in gathering and reporting information and by changes in methods of recording data within agencies. As a result, data sources lack a clearly defined, common criteria for the categories that will be included. For example, this study relies heavily upon prison reports covering almost 150 years. However, these reports do not follow a standardized format. The wardens and officials, who prepared them, were periodically replaced as new political administrations assumed office. Therefore, the style and content of these reports varied. Furthermore, variations occurred even when reports were prepared by the same individuals.

Additionally, the validity of these reports, as indicators of the reality of prison life as experienced by the inmates, is questionable. These records, as well as others used in this research, were prepared for administrative purposes and not for the purpose of

maintaining an historical record. It is important that they not be viewed as an accurate depiction of the actual life conditions of prisoners in New Hampshire or of the women prisoner's correctional experience. As reports submitted to a board of supervisors by the caretakers of the prison, they cannot be assumed to be entirely candid, objective, or even accurate. Prison officials were, then as they are now, political appointees. This fact can be assumed to influence the information that is both selected to be shared and that which is selected to be withheld in preparing this type of document. The realities of prison life, as experienced by the inmates, could have been, and in many ways probably were, substantively different from the descriptions provided by prison administrators. In fact, additional documents that I examined relating to special investigations conducted into charges against the prison and some of its officials in the nineteenth century, as well as other essays, suggest that prison life may have been less placid, orderly, and humane than official documents alone suggest.

However, the nineteenth century prison reports, in particular, are valid indicators of correctional philosophies, attitudes, and thought that provided the basis for the policy and objectives of the state prison. As such, they provide a philosophical foundation for understanding the thinking that has shaped the development of the contemporary correctional system. In the absence of diaries, letters, or other accounts offered in the prisoners' own voices, the official record provides a lens for retrospectively viewing prison conditions.

A conscious effort has been made to avoid the temptation of interpreting the conditions described in these documents from the perspective of modern penological

theory or practices. Their use is intended to describe, as accurately as possible, the correctional conditions that existed prior to the creation of a separate women's prison--with occasional speculation offered on how events may have been interrelated in their consequences or outcomes.

In order to compensate for some of the problems of reliability and validity inherent to this type of research, a variety of archival sources on prison conditions from the origin of the penitentiary in New Hampshire to the present time were used. Through techniques of replication and data triangulation (Patton, 1987:60-61), the description of incarcerated women is corroborated to the best possible degree.

As has been stated, prison reports have provided progressively less information on women prisoners over time. The prisoner statistics that are included in contemporary reports are not categorized by gender. The first report filed on the women's prison after its creation is only three pages long and half of that space is occupied by photographs (Department of Corrections, Biennial Report, 1988-1990). It may be that the prison was too new to have much information available for inclusion in this report. However, it would seem that the opening of a prison for women where one did not previously exist should warrant more detailed discussion in its first official report. Such lack of attention paid to the opening of the women's prison characterizes the difficulty that was encountered in trying to locate information on women prisoners in the twentieth century.

This inattention is not confined to the biennial report. A legislative prison expansion study was also fairly limited in its references to the soon-to-open women's prison. Although difficulty in obtaining accurate statistics on female prisoners was noted

(State of New Hampshire Prison Expansion, Performance Audit Report, April 1992:112-113), it is hard to understand why more attention to the women's prison would not have been provided in a study of this nature.

Additionally, in preparation for the Fiandaca lawsuit, the inmate's legal counsel requested specific documentation from the state regarding correctional policy and conditions as they applied to women in New Hampshire and Rhode Island. This documentation included the following: any and all negotiations, agreements, correspondence between New Hampshire and Rhode Island regarding the temporary or permanent placement of female inmates; reports regarding conditions of confinement in New Hampshire or any other correctional facility where women under state sentence are confined; documents regarding the policy and monitoring practices of confinement conditions for women; policy for self-improvement opportunities for women prisoners. In each case the response was that none was available, with the exception of one memo from the female inmates' caseworker to the warden that discussed service delivery problems for female prisoners (Plaintiff request for documents, New Hampshire Legal Assistance, February 2, 1984).

The sparsity of official records and documents regarding the care and needs of female prisoners in New Hampshire, exemplifies the contention of scholars that women in prison are frequently forgotten (Simon, 1979:313; Lown and Snow, 1980:195).

With this explanation providing a context for the research that follows, this chapter will reconstruct what is known of the characteristics of female offenders and the conditions of their confinement from the mid-eighteenth century to the present. The

descriptions of seventeenth and eighteenth century laws, crimes, and punishment that follows is taken from Jeremy Belknap's The History of New Hampshire (reprinted 1970) and Elwin Page's Judicial Beginnings (1959).

### Colonial New Hampshire

The oldest town in New Hampshire in terms of continuous settlement is Dover, having been established sometime between 1623 and 1627. Court records date back to 1640 (Page, 1959:xvi-xvii). Since the colonial era was one of frontier development, settlement communities were small in size (Turner, 1983:3-11). The population of New Hampshire, although unknown with certainty, is estimated to have been approximately 1,000 residents. Dover's population was estimated at about 250 and nearby Portsmouth was approximately 125. As a result, the number of cases handled by the courts was also very small. In 1648, the county court in Dover, which included cases for Portsmouth, records only 16 criminal cases in a 13-month period. Civil actions seem to have occupied more court time than criminal activity (Page, 1959:xvi-xvii).

Court Organization in the Seventeenth Century and Eighteenth Centuries. Prior to 1642, the locus of justice was at the level of the town. From the mid-1640's until 1679 New Hampshire was joined with the Massachusetts Bay Colony and under the jurisdiction of the Massachusetts General Court (Page, 1959:xvii). After 1679 provincial courts were briefly organized in New Hampshire but were abolished by 1689. This was followed by a brief period of about a decade when government and courts were totally disorganized due to political turmoil over land claims and Indian attacks, and during which New Hampshire also reunited with Massachusetts for a short time. By 1699, the provincial courts, which

provide the historical legacy for the contemporary court system, were reestablished (Page, 1959:xvii and 39-40). Although the most common form of dispute resolution seems to have been arbitration, there is reference made to a jury trial being conducted in Dover in 1641 (Page, 1959:5-6).

Following the revolution, by 1784, New Hampshire established its form of constitutional government. Legislative power was vested in a General Court, and Executive power in a President and Council (Belknap, 1970b:201-202). Judicial organization consisted of a Superior Court, presided by a Chief Justice and three associate justices. The jurisdiction of this court was over "high crimes and misdemeanors" which included appeals (which were actually trials de novo) from probate and inferior courts. Under the superior court were the county courts called inferior courts. These courts heard civil cases involving damages over 10 pounds but did not hear criminal cases. They were held four times a year with four sitting justices. Courts of General Session were held in each county the same week that inferior court was held. These were the equivalent of modern justice of the peace courts, so called because they were presided over by the justices of the peace. They heard lesser crimes and "breaches of the peace" as well as "various occasional and prudential matters" (Belknap, 1970b:206). Finally, were the probate courts which met monthly and handled wills, estates, and "the care of widows and orphans, idiots and persons insane" (Belknap, 1970b:206). Indictments were issued by a twelve-man Grand Jury. Trials were heard before a 12-man petit jury whose verdict was required to be unanimous.

Crime and Punishment in Colonial New Hampshire. The offenses handled by the

New Hampshire courts seems to be consistent with those reported in other studies (Spruill, 1972) of colonial crime, law, and punishment. As was typical of colonial courts, considerable time was dedicated to regulating social behavior as opposed to controlling serious criminal activity (Page, 1959:122). In the 17th century, crimes like murder were brought before the Grand Jury for indictment by the State Attorney General. Trials were held in Boston, at the Court of Assistants, which provided court jurisdiction for New Hampshire at that time (Page, 1959:106). By the late 1700's, these crimes were handled at Superior Court, with lesser crimes heard in Courts of General Session. Local courts primarily handled misdemeanor offenses.

The most frequent offense sanctioned by the court was drunkenness and the disturbing the peace. Drinking was common behavior and prosecution only occurred when drinking and rowdiness was excessive (Page, 1959:123; Belknap, 1970b:199). The next most common court sanction was for fornication, which included the "premature" birth of the first child after marriage." The penalties for fornication were marriage, fines, corporal punishment or a combination of all of these. Punishments could range, therefore, from public repentance to whipping (Page, 1959:124).

Violent crime was uncommon, with the exception of assault and battery, which was often linked to drinking, and wife-beating. Married couples accused of fighting would be both fined and whipped. Homicide was rare, and even theft was an infrequent offense (Page, 1959:xcvi).

Speech and language were closely regulated with the severity of punishment proportional to the severity of the violation. Slander was both a civil and a criminal



offense that could be punished by admonition and/or the slanderer paying damages to the victim (Page, 1959:92-93). Lying, if the perpetrator was over age 14, was punishable by admonition or fine and mild swearing could result in a fine or gagging. Profanity or slander was punishable by fines, stocks, whipping or all three. Perjury could result in the offender being nailed by the ears to a pillory and blasphemy was a capital offense (Page, 1959:126-130).

Page (1959, 93-95 and 117-120) reports only three criminal accusations of witchcraft, and 4 civil cases of slander that involved accusations of witchcraft. In all but one of the civil cases, the court failed to support the allegations. In the criminal cases, there was only one instance of a woman being sentenced to hang, and that involved a woman with a long history of involvement in social conflicts who had provoked considerable community resentment. She had been acquitted of witchcraft several years before but was later recharged and hung, even though many questioned the soundness of the evidence against her (Page, 1959:93-95). Unlike neighboring Massachusetts, New Hampshire did not appear to get caught up in the witch hysteria that gripped that colony.

Capital offenses were more common then than today, but there were fewer offenses punishable by death in the colonies than in England at that time. It does not appear that this punishment was widely used in New Hampshire. Although serious offenses could result in dismemberment, banishment, and death by hanging, the most commonly administered punishments were fines and whipping (Page, 1959:102).

Regarding the harshness of laws and punishment, Belknap observed in 1792 (1970b:207) that "[I]n the trial of criminals, the courts proceed with great tenderness. The system of

penal laws is mild. Six offenses only are capital; arson, burglary, murder, robbery, sodomy, and treason. During the last twenty-five years, there have been no more than two capital executions in the state, both of which were for murder."

It is difficult to determine from extant court records of colonial New Hampshire the extent to which crime and punishment was gender-based, if at all. Belknap does not provide any information on the legal or penal treatment of women in the eighteenth century. Page's accounts of the seventeenth century, suggest that men and women were punished with comparable severity. However, disparities may have existed in the types of offenses for which women were punished in comparison to men, particularly in cases involving fornication and illegitimacy.

Theoretically, both partners were subject to punishment for these crimes. For example, in one case of a birth occurring too soon following the marriage, the couple was required to make a public confession of their sin and pay court costs or be whipped and fined. In practice, however, punishments may have fallen more heavily on the unmarried mother, particularly if the father would not marry her, or if she refused to disclose paternity. For example, in 1668, Mary Read refused to name the father of her illegitimate child. She was sentenced to 20 stripes at the whipping post and fined 10 pounds. Failure to pay her fine would result in 10 additional stripes unless she named the father. However, the last penalty of 10 stripes would be suspended if she paid 5 pounds of her fine, even if she still refused to name the father (Page, 1959:45).

The identification of the child's father by the mother was sufficient proof of paternity for the courts. However, the most commonly ordered punishment for men was

to pay child support. Women seemed more likely to be fined or whipped. Often, males would go completely unpunished since women frequently would not reveal their identity (Page, 1959:124). In 1665, the Massachusetts General Court reported an increase in illegitimate births. Three years later the "Bastardy Act" was passed to relieve the towns of public support of such children (Page, 1959:124). Consistent with the southern colonies, it appears that at least some of the concern over illegitimacy was economically motivated.

Public morality frowned upon men who took advantage of "loose" women, but their punishment seems to have been less severe than that of women who engaged in immoral behavior. Instead of being whipped, which was the common punishment for women, one man sentenced for boasting over his sexual conquests was ordered to stand at the entry of the public meeting house for one-half hour before a meeting wearing a sign that read: "This person is convicted for speaking words in a boasting manner of his lascivious and uncleane practices" (Page, 1959:125).

Although there were some references to infanticide, this also did not appear to occur often. In one case of a mother suspected of strangling her infant, the punishment was 30 lashes on bare skin with a halter around her neck to symbolize hanging, to be repeated one month later after the first wounds healed (Page, 1959:124).

Consistent with the southern colonies (Spruill, 1972), the principle of coverture was recognized in New Hampshire. As a result, husbands were often held accountable for their wives' behavior and penalty. For example, in 1663, a married woman was sentenced for missing church 20 times. When her husband protested that the judge's behavior was malicious, he was sentenced to 15 stripes at the whipping post. Similarly, if married

women were slandered, their husbands would be named as co-plaintiffs. Conversely, if they slandered someone else, their husbands became co-defendants with verdicts usually favoring the plaintiff in such suits (Page, 1959:45).

The Use of Imprisonment in Colonial New Hampshire. Based upon the works of Belknap and Page, it appears that imprisonment rarely occurred and when it did, its use was limited. Not much is known of the prisons during this era. They were used to house debtors and seemed to contain some elements of the workhouse. Inmates were chained to prevent escape, since the structures used for confinement were not usually built for that purpose and, thus, were not very secure. Page (1959:115) refers to work being provided with the profit used for the care of the inmate and his family.

Belknap's (1970b:208-209) description of debtors prisons suggests that little change occurred from the seventeenth to the eighteenth century: "Prisoners for debt are allowed a chamber in the jailor's house, and liberty of the yard. They may employ themselves in the business of nail-making, the materials for which are provided by the county; and the laborer is allowed one-fourth part of the nails which he makes." Criminal offenders might also be sentenced by the court to make nails for use as payment of fines, damages, or court costs.

Belknap also refers to prison being used to confine political dissenters and rebels. One such inmate, in 1682, was held in a prison located in Portsmouth described in the following manner (Belknap, 1970a:100): "We have a hard prison, a good keeper, a hard Captain, iorns (sic.) an inch over, five foot and several inches long, two men locked together." Often, however, it appears that confinement was still in someone's home with

"liberty of the yard" (Belknap, 1970a:107).

In 1699, the legislature approved the expenditure of public funds so that "a strong logg (*sic.*) house be built for a prison of thirty foot long, fourteen wide, one story of seven foot high, two brick chimneys in the mids, five foot each, to be done forthwith strong and substantial" and located in Portsmouth (Bouton, 1869:88).

There are no comparable examples cited of women being sentenced to imprisonment with one exception. There is a reference to a married woman being held in prison overnight because of a disagreement over the method used to repay a debt. This case, however, was linked with political conflict involving the woman's husband. It does not appear to be reflective of the manner in which the courts routinely treated women (Belknap, 1970a:484-485). However, considering the similarity of punishments applied to men and women, there is no reason to believe that women were exempt from imprisonment.

Given the limited information available, it appears that the types of offenses for which women appeared in court were primarily public order violations. Also, it seems that penal sanctions were relatively comparable for men and women. Imprisonment does not appear to have been widely used for any offender. The law allowed the use of the pillory, dismemberment, hanging but the most commonly administered penalties seem to have been whipping and fines. It is possible that women may have been punished more severely for offenses against morality, especially illegitimate birth. However, much of this may have been due to refusal to name the father.

It is also possible that women may have been held more accountable for sexual

misconduct because their transgressions were more visible and had more direct consequences for the community, which often assumed economic responsibility for illegitimate children of unknown paternity (Spruill, 1972). Also, some punishments may have appeared equitable in kind yet been inequitable in consequence. For example, fines probably affected women more harshly because of the limited economic resources of women.

The lack of "hard crime" may have at least, in part, been due to the communal nature of social life, and the lack of anonymity afforded in a society characterized by primary, face-to-face relationships. Serious crime would be harder to conceal and would possess greater significance than in modern society because of more extensive and intense social interaction. Similarly, penalties of social exclusion and public censure would have greater significance in a society that is more collective and less individualistic (Durkheim; 1964). As is true today, however, offenders who committed serious crimes were likely to receive severe punishments, with gender being less of a consideration than it might be for lesser crimes. Being female did not spare women from the whipping post, from public humiliation, or from hanging.

#### The Imprisonment of Women in the Nineteenth and Twentieth Centuries

As New Hampshire became more economically prosperous and attracted more settlers, its population grew in size and diversity. Despite fluctuations, populations increased by 30% in the last decade of the eighteenth century (Sanborn, 1904:240). Over the next 30 years, New Hampshire's population grew by 72% (Turner, 1983:189). The economy was still primarily agrarian-based and the style of living still more rural than

urban, but industrialization and its accompanying social changes was gradually occurring (Turner, 1983:192-193).

By the 1840's, New Hampshire had become one of the most progressive states in the country in developing programs and policies directed toward social improvements. These included improvements in public education, labor laws, treatment of the mentally ill, public construction projects and penal reform (Heffernan and Stecker, 1986:120-121). The changes in penological theory and practices that were occurring in other parts of the country during the late eighteenth and early nineteenth centuries were also adopted in New Hampshire. In fact, New Hampshire has been described as having made "a real contribution to prison management and progress in this country" (Lewis, 1964:149).

One of the most significant changes in penology was the birth of the penitentiary for reformation of criminal offenders. Writing in 1897, about the state prison, Henry Robinson (1897:217) observed: "It was at the very opening of our present century that our state began to feel the need of a prison."

In 1804, the governor's message to the legislature included the request for the establishment of a prison and a commission was appointed to study the need. The need for a prison was agreed to in 1805, and construction of the first state prison began in 1810. Its first occupant, a man sentenced for five years for horsetealing, was incarcerated in 1812. He was alone at the prison for five months (Robinson, 1897:217), but by 1813, 11 prisoners were incarcerated there (Austin and McCormick, 1929:584; New Hampshire Department of Corrections Biennial Report, 1988-1990:21).

The initial building, later referred to as the South Wing, was built out of granite

quarry and was 70 feet in length, and 36 feet wide with walls 3 feet thick. It contained 36 cells, each 8 feet by 9 feet, except for 6 cells located in the upper level for the sick which were 10 feet by 17 feet. A 14 foot granite wall encircled the yard (Robinson, 1897:217).

By 1831, overcrowding was evidenced by the confinement of 82 inmates in the cells originally built for 36 inmates. In a scene not uncharacteristic of contemporary society, cots were located in the hall, corridor and sick rooms. As many as 5 to 8 men would be housed in a cell intended for single occupancy (Robinson, 1897:217-218). As a result, a resolution was passed that year to construct an addition on the north side. Yet, overcrowding continued, and a new prison was authorized in 1877.

Little information was found on male prisoners, and nothing on females, during the early years of the prison's operation. In 1832, there was one woman confined at the state prison, and the female population was rarely more than a half-a-dozen throughout the century.

Given the extremely small number of women sentenced to the state prison, it would be reasonable to assume that all who were would have committed particularly serious crimes. Yet, this was not necessarily true. Although several women were sentenced to prison for murder, this was not the most frequently committed offense. Instead, similar to today, most of the offenses for which women were committed were non-violent.

The offenses for which women were incarcerated included: murder, accessory to murder and non-negligent manslaughter; stealing (money, horse, horse and carriage); larceny; breaking and entering; breaking and stealing; arson (mill, barn); concealing the



death of a child; adultery; and bigamy (State Prison Reports, 1853-1900).

By today's standards many of these acts do not appear to be serious crimes. However, it is difficult to know their significance for nineteenth century society. For a crime like murder, which was a capital offense, imprisonment may have been a lenient sentence. Prison records do not indicate how many offenders, if any, were executed during these years. However, since men were also sentenced to prison for murder, if this was considered a more lenient sentence, its leniency was also extended to men. A comparative examination of the sentences of men and women convicted on the same charges did not reveal notable disparities in sentence lengths. However, it is difficult to determine whether there were differences in the actual time served on the basis of available records.

For the remainder of the nineteenth century, and for more than 80 years of the next, the number of women inmates appears to have fluctuated between 2 and 8. Although exact population figures are not available, the number of women imprisoned does not seem to have exceeded 25 until after the women's prison opened. In 1983, the year the lawsuit was filed, there were approximately 17 women confined under state sentence, and by 1992 this number had risen to seventy-four (Department of Corrections, Biennial Report, 1990-1992:55 and 28).

Conditions of Confinement in the Nineteenth Century. Initially, women prisoners were confined in an attic room, or possibly rooms, in the warden's residence. Prison reports do not indicate the presence of a matron to care for them. However, in 1856, Warden Eastman requested an appropriation of \$27 to purchase a silk dress for Miss

Louisa Willey, the 14 or 15 year old daughter of the overseer, as compensation for her care of the women prisoners. There is no further reference to a matron until 1879 when this position is included in the prison report for the first time. Although the warden, chaplain, and physician each wrote reports on their work to the Board of Trustees, there were never any matron reports.

In 1899, the Rules and Regulations of the New Hampshire State Prison, established by the Governor and Council on June 6, 1883, were amended to include female prisoners and the duties of a matron. In what may reflect an historical precedent for parity, the amended rules succinctly state that all the rules and regulations that apply to men apply to females, to be enforced by the matron under the warden's supervision. The duties of the matron were encompassed within three broad mandates. First, to teach those in need of instruction and administer moral and religious advice so as to "promote order, decorum, propriety of behavior, and reformation." Second, to assemble the females in chapel on Sunday, and provide them with bibles and hymn books. Third, to maintain inmate records including the work completed and the articles made. The proscribed punishment for females was confinement to cells. The matron was to then inform the warden in order to receive instructions regarding the punishment which would be in accordance with the offense committed. This appears to be consistent with the policy for the men (Rules and Regulations of the New Hampshire State Prison, 1899:10). Corporal punishment was prohibited, although guards could shoot to kill in self-defense or to prevent escapes. Punishment was solitary confinement or being secured with a ball and chain (Quinby, 1873:21).

The degree of difficulty the women experienced because of the lack of a matron is uncertain. Historical accounts of incarcerated women suggest high levels of disorder, violence and exploitation of inmates in those prisons without matrons (Lewis, 1965:163, Rafter, 1992a:xxvi). Although it may seem reasonable to assume that this also characterized the treatment of women confined in New Hampshire, there is evidence to suggest that this may not have been the case.

It seems that if the women were disruptive or disorderly, particularly given their close proximity to the warden and his family, some mention of problems would have appeared in the various reports that were filed. Although some reports indicate clear dissatisfaction with this arrangement, there is no specific mention of the women behaving in a disorderly or disruptive manner. Given the desire of the wardens to relocate the women (Warden's Reports to the Board of Trustees, 1852, 1853, and 1854, hereafter referred to as Warden's Reports), it would be reasonable to assume that had this occurred, they would be motivated to include it in their reports in order to add urgency and strength to these requests.

The wardens' reports do not specify the physical dimensions of the women's living area so the degree to which they were overcrowded, if at all, cannot be determined. It would seem, however, that if the congregate housing of women in attic space created conditions of extreme hardship, there would be some resultant behavioral disturbances. In the area of prison reform, it has been observed that where basic humanitarian concern fails to stimulate change, disruptive behavior often succeeds (Allen and Simonsen, 1978:65). In numerous other states, wardens actively lobbied to avoid receiving women or to

remove women from their prisons because women were considered to be extremely difficult to manage within a correctional environment. A representative of the Boston Prison Discipline Society, upon visiting the Ohio penitentiary in the mid-1840's, observed that the 9 women inmates confined there were more difficult to manage than the 500 males (Rafter, 1992a:7). In view of this, it seems reasonable that if the behavior of the female prisoners in New Hampshire disrupted the order of the prison, or the homelife of the warden, other arrangements for their confinement would have been made. Such arrangements also would have been consistent with the national trends that were occurring during that time period.

It was the overcrowding of women in small attic rooms, inadequate in space for the numbers filling them, that contributed to much of the violent and chaotic behavior that characterized the correctional treatment of women in the United States in the nineteenth century (Rafter, 1992a:4-6). In response to these problems, most institutions began moving women out of these attic rooms and into individual cells in the early 1800's. (Rafter, 1992a:xxvi). Although women in New Hampshire were also eventually moved into a separate wing of the prison, prison reports indicate that they remained housed in attic space at least until the mid-nineteenth century (Warden's Reports, 1852, 1853, and 1854).

It is not certain exactly when the women were moved into cells. In 1869, the prison was renovated, and, at that time, the women were being housed in the South Wing (Quinby, 1873:20-36) in what is referred to as the "Female Department" (Warden's Report, 1861). The South Wing was 80 feet by 46 feet and contained the female cells, a

dining room for subordinate officers, a matron's room, lodging rooms, and a kitchen (Robinson, 1897:219). Originally, the South Wing contained 36 cells but it is unclear how many cells were available for women, how large each cell was, and what furnishings it contained.

How the women prisoners spent their days is not known from these reports. At least part of their time was spent in providing domestic services for the warden, officers, and even the male inmates during these early years. In the 1870's, there were references to their mending and making clothes for the officers and male inmates, doing the laundry, and performing domestic chores in the warden's quarters (Quinby, 1873:17). It was also noted that their presence in the living quarters of the wardens and their families was not without inconvenience or dissatisfaction.

In 1852, Warden Rufus Dow included a plea for separate quarters for the women in his report. He specifically requested that the old prison building, used only for storage, be converted to female quarters, rather than to a workshop as intended. Claiming the need for greater security, he described the near escape of one female from her "sleeping room in the attic" using only a pocket knife. The escape was thwarted when information provided by another female convict led to her recapture at the train yard. The warden cited this attempt as evidence of the need to make "different arrangements" for these inmates. This, combined with the growth in the female population (which now consisted of 3 women), resulted in his reiteration of a request for separate female housing that was evidently made in an earlier report. A closer reading of his report, however, suggests there may have been additional concerns motivating this request: "The same necessity

now exists and to a greater degree, inasmuch as the number since then has been materially increased, and of course the anxiety and annoyance of being compelled to receive into the family and at the table, these persons have been correspondingly increased" (Warden's Report, 1853:9).

The following year, Warden Dow was replaced by Warden Gideon Webster, who also requested approval from the legislature to convert the old prison building for "providing other convenient and desirable apartments, including a storehouse...but more particularly a more convenient and suitable place for the confinement of female convicts" (Warden's Report, 1853:13-14). Once again, concern over security and dissatisfaction with the inconvenience being caused to his family were cited in an effort to secure separate quarters for the female inmates. Warden Webster repeated the refrain of his predecessor: "In addition to the security now existing, it is extremely unpleasant (as has been said before by ex-Warden Dow) to be compelled to admit these convicts to the presence and society, and even to the table of the family living in the house, as is now and ever has been done" (Warden's Report, 1853:14). Warden Webster also reminded the legislature that finances should not prohibit this renovation because the prison is no longer dependent on the "state's charity...[being one of two or three prisons in the country that are]...self-sustaining in their operations" (Warden's Report, 1853:14). Were this not enough, ex-Warden Rufus Dow (Warden's Report, 1853:22) also included a separate report urging the legislature to provide "a more suitable place for the confinement of the female convicts." He referred again to the security problems that were caused by their being housed outside the prison walls and "the annoyance to the officers of the prison in being

compelled to receive them as intimates of the family." Referring to his lack of vested interest in this issue since he was no longer the warden, he identified the advantage of having them "under the especial supervision of one of their own sex."

Evidently, these pleas were unheeded because in the following year, Warden Webster's report (Warden's Report, 1854:19) once again referred to the need for additional rooms in the attic for the increased number of female inmates and refers to "the consequent extra trouble to the family living in the house of the prison and having charge of them." The female population had risen to 4 women in 1854. His frustration over having this issue unresolved may have spilled over into other areas because the tone of this report is atypically critical of overall prison conditions. He referred to health problems resulting from consumption and implied that the state was not expending sufficient funds on the prison. This latter criticism is particularly interesting since he extolled the prison as being economically self-sufficient one year earlier.

In addition to his problem with housing the women, Warden Webster also addressed the difficulty of housing a very young population. Half the inmates were under the age of 25, one-third were under age 20, and there was even a 9 year old boy confined. The warden urged the legislature to build a state reform school for these youths and remove them from the prison population.

In 1855, the female population rose to 6 and all references to providing separate quarters for the women stopped. It may be that the request was granted and this was no longer a problem, or that he resigned himself to the fact that changes were not forthcoming under his term since he was being replaced in the coming year. In any event,

this report took on a more positive tone than that of the previous year. It emphasized the importance of reformation as the main objective of the prison and the importance of discipline and order. The need for a state reform school was reiterated. It is particularly interesting that despite a rather long plea for the special correctional needs of the boys, there was no reference to the female inmates and their needs.

It is quite possible, however, that the women were moved into their own quarters by this time. In 1856, the new warden asked for larger accommodations for himself and his deputies so that they might entertain guests without any reference to the inconvenience caused by having the female inmates share their residence. It is also in this report that the request for a silk dress for the overseer's daughter who was acting a matron was made. Also, by 1861, prison reports included an inventory for the "Female Department," which further suggests that women were given different accommodations. It is interesting to note, however, that the items listed in this inventory do not suggest housing for women: 2 iron bedsteads, bed, and bedding; 2 stoves and funnels, 5 chairs, 10 shirts, 2 rifles, 8 guns, 1 grass pistol, and 1 slop bucket for a total value of \$48.25 (Warden's Report, 1861).

Despite lengthy dissertations on crime, penology, and the rehabilitative needs of the male prisoners, relatively little information is provided in these reports on the women. In 1862, a legal dilemma arose regarding the transfer of inmates to the prison from the state reform school, which had been recently established (Sanborn, 1904:329). A female inmate at the industrial school was transferred to the state prison after serving 2 years of a 3 year sentence. The warden was uncertain as to whether she should serve 3 more years at the prison or complete the remainder of her original sentence. His report (1862:11)



stated that he "made inquiries of professional gentlemen but am unable to get a positive opinion that will be satisfactory to the friends of convicts." He asked the legislature to clarify the law regarding the transfer of inmates between institutions.

Isolation. Historical and contemporary accounts of women in prison are consistent in identifying isolation as one of the most significant problems faced by incarcerated women (Arditi, 1973:1231-1243; Fabian, 1979:17-18; 1980:177; Rafter, 1992a). The degree to which female inmates at the state prison were isolated in the nineteenth century is uncertain. Reports from the first half of the century do not indicate the degree of contact, if any, that occurred between male and female inmates. However, their presence in the warden's residence indicates that they had some opportunity for contact with their keepers.

In several ways, the imagery that is conveyed from prison reports in the mid-nineteenth century suggests confinement conditions for women that were more similar in characteristics to those of the previous century. For example, in 1797, 8 women were confined at Newgate Prison in New York City. They lived congregately, without supervision, and cooked and sewed for the male inmates and officers. Due to the small institutional size, the women were able to still participate in daily prison life and were less isolated than they were to later become when moved into individual cells (Rafter 1992a:4-5). This does not seem dissimilar to the early conditions experienced by female inmates in New Hampshire.

At some time after 1854, the women were moved into individual cells. It is unknown how this may have affected their isolation, but they appear to have retained

contact with each other and with prison staff. Records from the late 1860's indicate that the women ate together at the table in the warden's kitchen and worked together in the laundry (Quinby, 1873:16 and 36). It is not clear, however, whether the women were allowed to communicate with each other while they worked. The silent system, developed at Auburn prison, was commonly employed to limit inmate interaction during this era (Clare and Kramer, 1976:53). The state prison was developed in accordance with the Auburn model (Sanborn, 1904:330), and silence and strict discipline were used with male prisoners (Warden's Report, 1863). However, it was not unusual for women to be excluded from this system (Rafter, 1992a:xii), and available records do not indicate whether it was also used with the female inmates.

There is some evidence to suggest, however, that the women were allowed to converse, and that whatever isolation they experienced had some respite. In 1867, testimony before a special legislative committee to investigate the state prison indicated that inmates were able to maintain communication with others outside the prison, communicated with one another, attempted and often did communicate with male inmates, and could even, on occasion, leave the prison with supervision. Emma G. Sanborn, the former matron, testified that one of the female inmates, Sarah Webber, sentenced for fifteen years for murder, was "allowed to keep money her friends sent her. She was taken down street by Mrs. Mayo [the warden's wife] to have her teeth fixed." Her testimony further revealed that female inmates were able to converse with one another: "Heard Sarah talking about the officers; she said: 'There is not back-bone enough in them to punish such prisoners as we are'." However, it does appear that communication between

male and female inmates was more closely restricted. The overseer of the cook room testified that there were "several attempts at communication between male and female prisoners" (Report of the Special Committee on the State Prison, 1867:8-11). This is also confirmed in two other documents (Quinby, 1873; Wardwell, 1880).

Although the prison reports provide an extremely sketchy portrait of the confinement conditions of women during the nineteenth century, a memoir written by Rev. Hosea Quinby (1873) on his term as prison chaplain from 1869 to 1872 offers some description.

By the late 1860's the prison was divided into two wings. The North Wing housed the men. It was 3 stories high and contained 120 cells. Each cell was 3'6" wide, 7' long, and 7' high and contained an iron bed that folded up out of the way. The South Wing which housed the women had a "tenement for the deputy and cells for the female prisoners" (Quinby, 1873:15). Evidently, at some point in time, the recommendations of Wardens Dow and Webster that the old prison be converted into female quarters were heeded because the South Wing was the oldest part of the building, originally built in 1812. In 1869, the prison was renovated with most of the work being done on the South Wing. At that time a new roof was installed, new female cells and other rooms were built, and the overall appearance and utility of the building's design was improved. Despite these improvements, Rev. Quinby (1873:36-37) identified three serious design problems that affected the living conditions of the women. First, their cells were located on the third floor which necessitated their climbing two to three flights of stairs in order to go to meals and work. He expressed concern that this "must prey most sadly on female

health," and believed that their cells should have been placed closer to ground level. Second, prior to the renovation, female inmates had a private stairway which was only observed by their attendant. After the renovation, the women had to use the public stairs "subjecting them to great inconvenience." Rev. Quinby "called the attention of the agent to this matter, but to no effect." Third, the room used by the women to do the prison laundry should have been designed so that "those laboring there, in turning out the waste water, should not be required to lift their tubs as high as, and in some cases, higher than their heads; and while washing, they should not be obliged to stand on ice so much."

When Rev. Quinby arrived at the state prison in 1869, the prison was severely overcrowded. Its population had begun to rise following the Civil War, reaching its highest number of 135 inmates in 1868. Although the population then began to decrease, there were 129 inmates, 8 of whom were women, in Rev. Quinby's first year at the prison. The number of inmates exceeded the available cell space, and he attributed this overcrowding to "the demoralizing effects of the late war" on social behavior (Quinby, 1873:22). His description of the male inmate population at that time and his etiological understanding of criminality anticipated the sociological theories that were yet to be developed.

Three-fourths or more of the inmates were either alcoholic or committed crimes that were either directly or indirectly related to their use of alcohol, and many were illiterate. He attributed much of their behavior to negative influences in the community such as "those rum sellers, keepers of billiard saloons, gambling dens, and houses of ill fame, all inviting crime" whom he believed deserved themselves to be incarcerated for

causing the criminal behavior of others (Quinby, 1873:23).

Although segregated, Quinby (1873:172) observed that communication between male and female inmates did occur: "In some cases the women's cells are in the same wards with the men's and they can freely talk together, though locked in separately, and probably never allowed to associate further." Inmates managed to sneak notes to one another and three couples made plans to marry upon release. The punishment for inmates caught attempting to communicate, was severe (Quinby, 1873:142). For example, in the winter of 1871, inmate Julia Saunders was placed in solitary confinement for over a week for writing a note to a male prisoner whom she later married. The cell in which she was confined had no heat, little or no light, a stone floor, and a ring bolt that was used to chain prisoners to the wall. Although records do not specify whether Julia Saunders was chained in this manner while incarcerated in this cell, it is known that she was fed reduced rations that consisted of 6 oz. of brown bread and a pint of water once every 24 hours (Wardwell, 1880).

It is difficult to determine precisely how isolated women prisoners were during this time period, but there is evidence to suggest they were not completely removed from the community. An unusual practice at the state prison was that of allowing the public to worship with the inmates at the prison chapel. Rev. Quinby (1873:8-9) described his first worship service at the prison. The public was admitted to the chapel, and while they were taking their places next to the minister "the female prisoners were being arranged at my right, closely facing the wall, with the matron and assitant beside them, that they might not indulge in looking upon others, for such an act was held as a misdemeanor." With the

door secured, the male prisoners were then brought in in single file. A military guard was posted at each window to prevent escape or disorderly conduct.

Prison rules forbade female prisoners from looking at visitors who came into their presence (Wardwell, 1880), so they could not look at the other parishoners. Nonetheless, their ability to participate in communal worship services must have conveyed a symbolic sense of inclusiveness with the broader society. Following the service, on Sunday afternoons, the minister would meet with the women inmates in their "work room," and there, along with the matron and some women from the community who served as teachers, would convene Sabbath School.

These conditions seemed to change dramatically, in 1870, under the administration of Warden J. C. Pillsbury. Warden Pillsbury's more punitive rather than reformatory orientation to the prison is evidenced by his requirement that the male inmates be referred to not as "men, but criminals, for such they are" (Quinby, 1873:62). His terminology for the women is not specified, but his policies for their treatment suggest that they were not viewed with much more benign favor.

One of the changes introduced, was to prohibit the women from participating in Sunday worship in the chapel. Warden Pillsbury announced to Rev. Quinby, "No, I don't propose to admit any females to that service." Misinterpreting his reasoning as being due to a belief that "the sight of a woman is demoralizing to a prisoner," Rev. Quinby suggested blocking the women from the men's view with a screen. Warden Pillsbury repeated: "No, I won't have a woman in the chapel." At this point, Rev. Quinby reminded the warden that the rules mandated attendance at worship service, to which he replied:

"Oh. I call the women's workroom their chapel." Unable to understand the specific nature of the warden's prohibition, Rev. Quinby objected that to hold a second service for the women after the first would "double his labor" and not be as "interesting and useful" to the women as hearing it when he was more refreshed. Warden Pillsbury replied: "I don't ask you to hold a second service with the women, for giving them a sermon. Only go into their room any time in the week, some evening if more convenient, and offer prayer, and that will be all sufficient." Persisting in his efforts to minister to the spiritual needs of the women, the Reverend asked: "How about commencing the school in the chapel?" The discussion was closed with the Warden's refusal to participate in the women's religious instruction: "Oh, I can't have anything to do with that, we are so tired, when night comes, with our other duties" (Quinby, 1873:62-63).

Warden Pillsbury also discontinued the practice of allowing women from the community to serve as religious instructors to the women inmates and of allowing the community to attend worship service at the prison. He did not see these endeavors as providing "a hope of reforming these prisoners, for they can't be reformed" (Quinby, 1873:63). Rev. Quinby brought the prohibition of female inmates from chapel service and sabbath school to the governor's attention, but the warden's wishes prevailed. The chaplain's concern for the women's spiritual needs, however, were not shared by the inmates. He noted that they liked not being allowed at service because they did not have to prepare themselves to be seen by the public (Quinby, 1873:67). He also attempted to hold secular class twice a week with the women but was soon told by the warden that they could not be spared from their duties in order to attend (Quinby, 1873:147).

Some additional changes were that inmates were no longer allowed to do crafts or have candles or writing materials in their cells. This led to considerable idleness and the chaplain worried that it might lead to violence. He observed that the men seemed depressed yet also anxious at Sunday Service, and despite their expressed satisfaction at being excused from its attendance, he thought the women also looked anxious.

Numerous cost-cutting policies that may have seriously jeopardized the health and well-being of all the inmates were also enacted. In order to save money, food rations were reduced and often the food that was purchased was spoiled (Quinby, 1873:86-88). Although Rev. Quinby thought that the women were actually better fed than the men in both the quantity and quality of the food they were given (Quinby, 1873:139), other reports suggest otherwise.

A complaint to the Governor's Council over the management of the prison under Warden Pillsbury, leveled a number of charges of brutality and neglect, several of which specifically addressed how women prisoners were being fed and cared for. One charge stated that during Warden Pillsbury's tenure, female inmates were not allowed to receive "flowers, apples, oranges, cakes, pocket-handkerchiefs, or those 'cloths' which women so much need at a time" (Wardwell, 1880:2). Another was that when Carrie House was admitted to the state prison she hadn't eaten all that day, and Warden Pillsbury refused to allow her to be fed (Wardwell, 1880: 3). Probably the most descriptive, is the charge that supported Rev. Quinby's claim that the food was often spoiled. The matron had requested of the cook, who was making soup for the men, two basins for two female inmates who requested some. The top of the soup to a "considerable depth was nothing but maggots



skins and the females refused to eat it" (Wardwell, 1880:5).

In addition to reducing operating costs through reduced rations and purchasing spoiled food, bedclothing was in short supply, and the prison was inadequately heated. Rev. Quinby (1873:92) speculated that "the women probably suffered less from the cold than the men" but he didn't explain why this would be true. The women's rations were also cut. In order to keep their quarters warm, the women had to go outside, get wood, and carry it up two flights of stairs. He recounts one particularly cold Sunday morning when he tried to rekindle the stove but "found only a few coals in the stove and one large stick in the box....we had short exercises, and I left them to endure this temperature as best they could" (Quinby, 1873:92). The women would watch the warden, and when he was out of sight, steal extra fuel. Had they been caught they would have been sternly lectured. When their pleas to him regarding the cold were ignored, they turned to his wife for support. She brought to his attention that if they became ill from the cold, he'd have to hire someone to care for them and perform their duties. He relented but not before their health was impaired. One inmate, who had been the healthiest and strongest and had carried the heaviest wood, became very ill and left the prison "an invalid" (Quinby, 1873:93).

Knowing that the warden had reduced the operating costs of the prison, Quinby questioned how this could be done without reducing the quality of conditions. His discussion of the budget noted an increase in salary costs and a decrease in the costs of food and fuel (Quinby, 1873:161-187). Displaying a penological wisdom and progressiveness far beyond his time, he (1873:151) cited the poor treatment of inmates

and pondered: "Is it any wonder that such people disbelieve in prison reform?" Rev. Quinby (1873:172) also viewed jails as schools for crime and called for classification: "Jails are cultivators of indolence. Men, women, and children are locked in there with no useful employment, except in that at Manchester."

Rev. Quinby attended the International Prison Congress in London in 1872 and expressed a strong commitment to the ideals of reformation that were stressed. In what was undoubtedly an attack against Warden Pillsbury, he advocated that reformation be the model for a prison not punishment and profit. This indictment stands in contrast to official prison reports which emphasize reformatory goals (Quinby, 1873:188).

#### The Correctional Treatment of Women in the Twentieth Century.

Twentieth century prison reports provide few sources of information on the subsequent treatment of women prisoners. However, there are other records that offer some further insight. In 1895, the State Board of Charities (SBOC) was established to inspect and report on state institutions. In 1913, their authority was extended to include the insane asylum and the state prison (State Board of Charities and Corrections to be referred to hereafter as SBOCC). Their biennial reports provide a rich source of information about county and state institutions in the early twentieth century.

Each county maintained and operated a county farm which cultivated crops and kept livestock. In addition, each county farm maintained an almshouse, a house of correction, a jail, and a hospital (for the care of county wards). The officers of the county farms included a Superintendent and matron, who was always the Superintendent's wife, a physician, and a chaplain.

County Almshouses. The almshouse is defined (SBOCC, 1914-1916:56) as "homes for those who are without means of support or friends able to provide for them, for the sick needing care which they cannot receive elsewhere, and for children for whom temporary provisions must be made." Many of the infants in the almshouses were born there, either to unmarried women or to women whose husbands deserted them, leaving them destitute. The children who were between the ages of 3 and 15 were described as "sub-normal mentally, cripples, or cases in the hospitals for treatment, with the exception of children placed temporarily until suitable provision can be made for them elsewhere."

Almshouses contained an extremely heterogeneous population of poor, housing males and females, ranging in age from infants to the aged, and immigrants as well as native born. A census of the population (SBOCC, 1912-1914:61) revealed the reasons for county aid as: "old age or physical disability, drunkenness, insanity, feeble-minded, epileptic, blind, deaf, crippled, infants under 6 years of age, causes not specified." The elderly and physically disabled seem to have been the largest group, comprising nearly two-thirds of this population. The next largest population was the feeble-minded, followed by the insane.

Occasionally, "on account of extreme poverty, illness, or both, an entire family must be taken care of at a county farm until other means of relief can be devised, but such instances are exceptional and the ordinary population consists of the aged, the sick, and of young infants born in the institution, most of whom go with their mothers when the latter are discharged" (SBOCC, 1914-1916:61). From 1913 through 1916, almost 40% of the population in almshouses were women and children under the age of three (SBOCC

Reports, 1912-1916). By 1914, the insane had been transferred to the State Hospital and efforts were underway to move epileptic children to the School for Feeble-Minded, where a new building was being constructed to house them (SBOCC, 1912-1914:60). Yet, even with the gradual removal of certain categories of inmates, the population of almshouses steadily increased from 1901 through 1914. In 1914, slightly less than 0.5% of the state's population were being cared for in almshouses (SBOCC, 1912-1914:63).

It also appears that efforts to separate penal populations from those in the almshouses were not always satisfactory. Most counties housed these two populations either in separate buildings or in separate wings of connected buildings. However, in Carroll County, they were housed together with the jail occupying the first floor of a three-story building and the dining and sleeping rooms for the women in the almshouse occupying the top two floors. This situation was one of concern for the State Board of Charities and Corrections (1914-1916:60): "The arrangement, universal throughout the state, of connecting places for the confinement of law breakers, under sentence and the homes provided by the counties for dependent old age and helpless infancy in an unfortunate one".

As can be seen in Table 13, the number of women sentenced to the houses of correction and jails, was far less than the number of women in the almshouses. Approximately 29% of the almshouse population from 1913-1916 was women over the age of 15. In comparison, women comprised slightly less than 8% of the jail populations and slightly over 6% of the House of Correction populations during the same time period.

Table 13. Number of Males and Females Confined in Almshouses, Houses of Correction, and Jails, 1913-1916

Institution	Year and Number of Males and Females Confined							
	1913		1914		1915		1916	
	male	female	male	female	male	female	male	female
Almshouse*	1,068	584	1,126	548	1,300	590	1,107	571
House of Correction	1,676	115	2011	121	1929	112	1717	151
Jail	722	77	772	48	825	57	599	56

\*Population of males and females over age 15 only in order to provide age range comparable to penal institutions.

Source: Compiled from State Board of Charities and Correction Biennial Reports, 1913-1916.

It may have been the availability of the almshouse, and its use for pregnant unmarried women and married women with children who were deserted by their husbands, that helps explain the small female population in penal facilities. Reliance on this institution may also provide some insight into why New Hampshire never established a women's reformatory. In 1911, the legislature appointed a committee to study establishing a state workhouse or reformatory as an alternative to county houses of correction. While the committee agreed that such an institution was desirable as a means of separating the "worthy poor" from the house of correction population, its establishment was not recommended due to disagreement over its "practicability" (SBOCC, 1912-1914:41).

Commitment offenses for the Houses of Correction were not categorized by gender, but included the following: drunkenness, offenses against persons, offenses against morality, vagrancy, non-support of family. Non-support was added as an offense category in response to legislation passed in 1913 which stiffened the penalty for men

deserting their families in an effort to deter those "individuals who otherwise would not hesitate to make their families public charges" (SBOCC, 1912-1914:42). The offense for which most offenders were committed was drunkenness. Between 84% and 89% of the population of the houses of correction were committed for this offense.

It is unclear from state reports why New Hampshire maintained both a jail system and houses of correction, or the exact distinction between them. It is evident from these reports (SBOCC, 1912-1914:71), however, that the jail system was viewed with considerable disfavor and numerous recommendations were made for reform: "In every report of this board substantially the same thing is said of our jail system. It is a relic; in some of its feature it is prehistoric." This report (SBOCC, 1912-1914:45) describes the jail system as "fundamentally wrong, and reformation of jail inmates not to be looked for while present conditions prevail." In even stronger condemnation, it stated that "while our jail system is to be condemned, many such institutions are conducted along human lines, but no management however wise can make of county prisons under the present system anything but a menace to society taken as a whole" (1912-1914:71).

SBOCC Reports do not categorize offenses for jail inmates, which adds to the uncertainty over the distinction of these populations. However, the SBOCC (1912-1914:71) does specifically state that the jails should be limited in use to "the detention of offenders held for the grand jury, and that other disposition should be made of minor offenders." It appears that the majority of the criminal population, approximately three-fourths, were housed in jails. What was of particular concern to the SBOCC was the use of jails for confining first offenders, the lack of classification among inmates, and the

idleness that characterized jail commitments. One report (1912-1914:71; 45) states that "for these first offenders the effect of their imprisonment is to train them for a life of crime...the boy committed for the first time has as companions drunks, and about every variety of hardened offenders, all spending their time in idleness, deteriorating morally and physically." Two years later, the same level of consternation with the failure of the legislature to institute jail reform, and a hint of sarcasm toward public apathy regarding this issue, is expressed (SBOCC, 1914-1916:64):

There is nothing new to say about jails, the situation remains unchanged...idleness helps demoralize whatever sense of decency may go with the prisoner as the jail doors close behind him, lack of occupation and of proper exercise tend to physical degeneracy...Our jail system is radically wrong, actively productive of evil, but appears to be looked upon with complacency by the people of New Hampshire, notwithstanding the quality of its output. Also, the taxpayers seem content to support not only the jail population, but the families of the prisoners, otherwise some plan would be devised to utilize the labor of those serving time in jail greatly to the benefit of all concerned.

Consistent with the prison reports, the primary concern expressed in the SBOCC reports was for the male offenders. Although women comprised approximately 7% of the combined jail and house of correction population from 1913-1916, no information is provided regarding their confinement conditions or care. As Table 13 reveals, however, female prison populations were small, and more women were confined in jails during this period.

In 1927, the prison was visited by investigators for the National Penal Society conducting a survey of corrections. Their report (Garrett and MacCormick, 1929:584-591) on New Hampshire provides a description of the prison on the day of their visit.

November 21, 1927.

The grounds consisted of a 27 acre farm worked by inmates and 5 acres, enclosed by a wall, that contained the prison buildings. These buildings were described as follows: "The warden's quarters in front are connected with the guard room in the center of the prison by a bridge. On one side of the guard room is the cell house and on the other the officers' dining room and quarters for the women prisoners. The workshops are built along the back wall of the prison."

There were 248 cells, each 6.6 x 8.6 x 7.6 feet high with a grated door and a small barred window. Cells were without indoor plumbing. Each cell contained a bed, mattress, blankets, sheets and pillow case, a small locker, and a table and chair, and were well maintained. The men prisoners also had a dining room (mess hall) which was sanitary; food was served cafeteria style and was not rationed. Vegetables from the prison farm were served daily and fruit once a week. Recreation consisted of baseball games on Saturday afternoon in the summer and football. Movies were shown on holidays, occasional shows were put on by the Grange, and many inmates had their own radios.

Prison industry was chair manufacturing done for an outside contractor. Inmates were paid 10 cents a day with a bonus that averaged 15 to 20 cents a day. New Hampshire was one of only two states that made accident insurance available. Some inmates worked in maintenance, a few worked on the farm, and most worked in the chair shop. There was no vocational training or school, but a few inmates were taking correspondence courses.

The prison had a hospital with one ward and 3 beds and an operating table.



Surgical instruments and dressing were brought in by the surgeon. There were no X-ray or laboratory facilities. A doctor visited daily and a dentist came in for half-a-day once a week. There was no classification system, but when admitted, inmates were isolated for two days, given a physical, and seen by the dentist and an optometrist. They were not tested routinely for venereal disease, and inmates with tuberculosis were sent to a prison farm hospital in Vermont. No psychological testing was done.

There were 114 men incarcerated in the prison and 5 women, two of whom were serving long sentences, on the day of the visit. The women's quarters consisted of 14 cells, a kitchen, and a dining room in the wing opposite the men's cellblock. Their cells were not described so it is unknown whether their accommodations were comparable to that of the men.

The women did not participate in the same prison industry as the men. Their work consisted of doing the laundry, making shirts, and cooking for the officers. The report does not state whether they were paid, as the men were, for their work. Neither does it state whether any of the women were taking correspondence courses, as were some of the men.

Since there was no specific reference to the medical care received by the women, it must be assumed that they received the same initial examination and subsequent medical care as needed. There does not appear to have been any special provisions for women's health care available.

Similarly, the report does not state whether women had access to the same recreational opportunities as the men--baseball or football games on Saturday afternoons

in the summer. Since it is difficult to imagine that women participated equally in these activities, it is reasonable to expect that the women probably had less access to outdoor recreation.

New Hampshire had the smallest state prison in the United States at this time which is part of the reason for limited staff and services. Physically, the prison was described as "old but well kept." However, the investigators did note that the space available for the prison was insufficient.

It is particularly noteworthy that the report concluded with a recommendation for the women: "It is now generally recognized in principle that women prisoners should not be confined in a prison primarily for men. New Hampshire should make provision for the care of its women prisoners in some institution for women, in one of the neighboring states if necessary" (Garrett and MacCormick, 1929:591). This report is the last detailed document that specifically addressed the confinement conditions of women prisoners until 1983 and the filing of the lawsuit against the state.

In 1941, a medical program report referred to the problems associated with using the Hospital Superintendent, who was a nurse, as the matron-nurse for the women inmates. (Report on the Medical Program of the NHSP, to Stephen B. Story, New Hampshire State Comptroller, from Leslie Palfrath, February 24, 1941).

According to this report, combining these positions resulted in inadequate attention being paid to all inmates; created a health concern by allowing someone who cares for patients to have contact with the general population; and reduced security at the women's prison while the matron was on hospital duty. It recommended that these

positions be separated (Report on the Medical Program, 1941:9).

The warden, rejected this recommendation and spoke of the advantage of combining these positions since "the need for a full time matron-nurse at the women's prison makes her available for hospital duty at any time. Without the Matron-nurse it would be necessary to have a non-resident nurse called in for emergency or routine hospital cases." However, he was emphatic that this statement was not to be construed as an argument "for continuing the Women's Prison; that if and when it was abandoned another arrangement could be made for hospital nursing care." (Report on the Medical Program, 1941:Preface)

There are three recurring issues exemplified in this report. First, the debate over housing women had been a continuing issue for nearly 100 years, and, as unsatisfactory as everyone seemed to find the situation, nothing had appreciably changed. Second, the female population remained consistently low. Third, the care women were receiving was still of lesser quality than that of the men. Their matron had to do double duty, assuming other responsibilities that must have been demanding.

In 1941, New Hampshire entered into the New England Interstate Compact. This law allowed female inmates to be transferred to county facilities or out of state:

The Commission of Corrections is authorized to contract with the county commissioners of any county having prison facilities in which female convicts are kept separate or apart from male convicts, or with the authorities of other states having penal institutions in which female convicts are kept separate or apart from male convicts, for the care, custody, maintenance and confinement in such county prison facilities or out-of-state penal institutions of females convicted under the laws of this state of offenses punishable by imprisonment in the state prison or who may have been transferred to the custody of the state prison as otherwise provided by law. Such contracts shall be approved by the governor and counsel." (NH Rev.

Stat. Ann. Sec. 622:33 (1941))

Under this statute, the policy was for New Hampshire to accept one male prisoner from the state receiving one of its female prisoners (Hinck, 1989-90:229). The rational basis for this legislation was "to save construction costs for new facilities" and the "increased effectiveness of treatment programs" (Department of Corrections Biennial Report, 1960-1962:10, hereafter referred to as Biennial Report). This legislation was not created for the express purpose of transferring female inmates. Male inmates could also be transferred if there was a facility in another state that was suitable for their programming needs. The difficulty that arose, however, was that because New Hampshire did not have a state prison for women, all female prisoners were eventually subject to out-of-state transfer while all male prisoners were not.

It is difficult to know with certainty how many women remained incarcerated at the state prison in Concord, and how many were transferred to out-of-state facilities following this legislation. Prison reports do not provide specific or consistent information on the number or location of female prisoners. The first reference to a woman inmate being housed in another state, Vermont, appears in the 1942-43 report, where they continued to be sent until approximately 1966 (Biennial Reports 1942-1966).

In the early 1950's, the female unit at the state prison was converted to classroom space (Biennial Report, 1980-1982:2). However, a few women still continued to be held at the state prison. At that time there were 6 cells for women. The women worked in the kitchen and on sewing machines. According to former correctional Commissioner Nicholas Pishon (Concord Monitor, October 27, 1984, p. 2): "That was alright in the

1950's and earlier. But we couldn't confine women today and give them an opportunity only to be a dishwasher or a seamstress." Since there was "normally no expense involved in a transfer of these females" (Concord Monitor, October 27, 1984, p. 2), New Hampshire began to send all women prisoners out of state.

Women prisoners were sent to Vermont until the mid-1960's, and then to Massachusetts. Beginning in the late 1960's and for approximately ten years, New Hampshire women were also sent to Maine (New Hampshire State Prison Facility Study, 1976:viii-14) From the mid 1970's into the early 1980's, they were sent to Connecticut (Department of Corrections Biennial Reports). In 1971, a special report to the Board of Trustees (Department of Corrections, Biennial Report, 1970-1972:4-5), recommended that the offices in the South Wing, formerly used for women, be moved to the warden and deputy warden's residences and that wing be converted to treatment space. It also recommended that the women's detention room be converted into an administrative supply room. It would appear that by this time, all the space originally used by women was converted to some other purpose.

From all accounts, therefore, it appears that from some time after 1950, and until 1989, all female state prisoners in New Hampshire were transferred to the county houses of corrections or to other states. In 1982, there were two women in Massachusetts, one in Connecticut, one in Colorado, one in West Virginia, and one in the Belknap County House of Correction. There were a total of 13 inmates confined in different houses of correction but their gender is not given (Biennial Report, 1980-1982). The states that most commonly received women prisoners were Connecticut, Massachusetts, and Rhode

Island. However, women have also been sent to Colorado, Kentucky, and the federal prison for women at Aldersen, West Virginia. Currently, almost all female felony offenders are confined at the women's prison but some are still transferred to other state or federal facilities for treatment or security purposes<sup>12</sup>.

When the Fiandaca lawsuit was filed, the correctional problems faced by the female inmates varied in accordance with where the women were being confined. Conditions for women who were sent out of state were qualitatively different because of the variation that exists nationally among prison systems and across different institutions even within the same state. Similarly, women who were transferred to county houses of correction experienced different conditions both between institutions and in comparison to those who were sent out of state. However, there were global issues surrounding the incarceration of women that transcended institutional variations affecting individual offenders.

The conditions and issues, discussed in Chapter III, that have historically characterized women's prisons also existed in New Hampshire. Small, heterogenous and isolated populations, resulted in fundamental and systemic inadequacies and gender inequities that created a context for specific grievances. In general, the needs of women prisoners in New Hampshire were consistent with those of incarcerated women across the country. However, the practice of transferring women out of state or to county facilities heightened the inequities in their treatment.

On June 20, 1983, 7 female inmates serving state sentences under confinement at

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<sup>12</sup>The women's prison also serves as a House of Correction for Hillsborough County female misdemeanor offenders as part of the agreement with the county for leasing the facility.

the Rockingham House of Correction and Jail filed a lawsuit in federal district court charging the state of New Hampshire with gender discrimination and seeking equal protection under law. The next section will examine the confinement conditions that led to this lawsuit and the establishment of the New Hampshire State Prison for Women.

Correctional Conditions in New Hampshire - the Laaman Consent Decree.

On August 29, 1975 a male inmate at the New Hampshire State Prison (NHSP), Jaan Laaman, filed a civil suit in federal district court against the state of New Hampshire challenging the prison policies and procedures regarding emergency lock-ups. The case (Laaman v. Helgemoe, Civ. Action No. 75-258, Opinion) expanded to include medical and mental health care and services, opportunities for work, education and rehabilitation, classification, mail and visitation privileges, staff training and credentials, and the need for written policies and regulations.

The consent decree issued in this case resulted in comprehensive changes in the overall conditions of confinement and the quality and quantity of services and programs available to male prisoners at the state prison. Additionally, policies and procedures, previously unwritten, became formalized, insuring that inmates understood their rights and responsibilities. Since female prisoners were not confined at the state prison when this lawsuit was filed, Laaman did not refer to, nor address, prison conditions or policies as they applied to women under state sentence.

There are two issues surrounding the Laaman case that are relevant to this study. First, the conditions it grieved and eventually meliorated were comparable in a number of ways to the conditions being grieved by female inmates in the Fiandaca lawsuit (Laaman v.

Helgemoe Civ. Action No. 75-258; Fiandaca, et.al. v. Cunningham, et.al. Civ. Action No. 83-400-L). Second, the specific reforms ordered in Laaman do not apply to women prisoners or to the women's prison. This point is made quite explicitly in the Consent Decree that consolidated subsequent lawsuits alleging violations of Laaman, and that currently guides state prison operations (Laaman v. Powell, Guay v. Powell, Sullivan v. Cunningham Consent Decree). This Consent Decree (hereafter referred to as Laaman) applies to "all inmates who are or will be incarcerated at the NHSP" including all those now and in the future who are under the authority of the Corrections Department. However, it specifically states that "the term 'inmates' does not include female felons incarcerated in the women's facility in Goffstown, New Hampshire" (Laaman Consent Decree, pages 5-6). Furthermore, while the Laaman order refers to all present and future buildings in Concord and the half-way houses in Manchester and Concord, "the term 'NHSP' does not include the women's facility in Goffstown, NH" (Laaman Consent Decree pages 5). As a result, separate litigation was necessary to apply legal reform to the women's confinement conditions.

As previously noted, one of the major disadvantages of litigation as a vehicle for reforming correctional systems or institutions is the narrow scope of relief provided. Court orders only apply to the specific institution, system, or conditions that are legally challenged. Had even the spirit of the Laaman reforms permeated correctional objectives and policies, much less its legal mandates, the Fiandaca lawsuit may never have been necessary.

In fact, four years following the Laaman Consent Decree, the caseworker for the



female inmates sent a memorandum to the warden "to address the problems faced by women sent to NHSP." That memo discussed service delivery problems for female inmates and cautioned that the state was risking a "Laaman-type lawsuit" due to "unequal treatment of women in our system" (Memo, Edda Cantor to Warden Everett I. Perrin, 11/30/82). Six months later Fiandaca v. Cunningham was filed. Although the original complaint was filed by 7 inmates, the suit was later expanded to include all female inmates in New Hampshire.

#### Correctional Conditions Prior to Fiandaca v. Cunningham

Pre-trial Confinement. Disparities in the treatment of female prisoners occurred from the point at which women entered the correctional system, even for pretrial confinement. The court found that women in pretrial detention experienced problems similar to those of men, such as delays in trial time. However, for women the "conditions are much worse...[M]any of the county facilities, with very few exceptions, lack minimal recreational outlets such as the opportunity to get outside of the facility in an exercise yard for a walk" (Fiandaca v. Cunningham, Mem. Order, 1987:3). For example, a woman confined at Rockingham County House of Correction was only allowed to go outside in a fenced area twice a week during the 10 months of her confinement; another woman held at the Strafford County House of Correction was confined to her cell or the common area for 24 hours a day for 6 months; and a woman held at Hillsborough County House of Correction was told she was a guest there and would not be allowed outdoor privileges once the weather turned cold even though male inmates enjoyed this privilege. Additionally, although male inmates were able to exercise regularly, women were

restricted because of the lack of guards available to them.

Intake and Classification. Once tried and sentenced to incarceration, the gender disparities continued. The intake and classification process for men was lengthy and formalized. It consisted of standard intake procedures such as segregation from the general population for several weeks, medical examination, and extensive testing in order to determine institutional assignments and treatment needs. The male prisoners also received a manual of written rules, policies, and regulations that governed their confinement and informed them of their rights (Fiandaca v. Cunningham, Mem. Order, 1987:3).

Instead of a formal classification procedure, the women received an 'orientation' to prison life, conducted by their caseworker. Its purpose was to discuss, especially for those entering prison for the first time, "what it's like to do time and how to get by in the particular facility they're in and do their time in a safe and healthy manner" (Deposition of Edda Cantor, 1984). The intake process for women was completed in less than two hours, usually within approximately one hour (Fiandaca v. Cunningham, Mem. Order, 1987:3). Testing would only be done at the discretion of the intake officer if deemed necessary, rather than as part of a standard procedure.

Following intake, the correctional conditions of women prisoners varied in accordance with whether they were housed in-state at a county facility or transferred out-of-state. Institutional assignment of women was based on three criteria: (1) the length of the woman's sentence with consideration given for time already served in pretrial detention; (2) the availability of a host institution; and (3) an assessment of the woman's

background in terms of which facility will best meet her needs. These decisions were made by the Commissioner of Corrections and the State Prison Warden upon the recommendation of the caseworker (Deposition of Edda Cantor, 1986). Technically, institutional assignment is part of classification. The classification board at the state prison consisted of a classification officer, a member of the custodial staff, and a mental health worker. No written notice of rights to appear before this board was given to women. While male inmates usually would appear in person before the Classification Board, the women inmates did not, being represented instead by their caseworker (Deposition of Nicholas Pishon, 1986:30-32).

Women could request to serve their sentence in New Hampshire, or at a particular out-of-state facility that offers needed treatment. The Department of Correction would attempt to place female inmates in the institution that was requested whenever possible. However, the dramatic rise in prison populations was making institutional space more difficult to secure. At the time of the lawsuit, only Connecticut and Massachusetts were accepting New Hampshire prisoners (Fiandaca v. Cunningham, Mem. Order, 1987:6).

Since women were assigned to different county jails and prisons in several different states, the prison experience was highly individualized in accordance with each particular institution. As a result, conditions varied between women as well as between women and men. Whether conditions at the men's prison were good or bad, they were at least uniform--male inmates experienced the same physical environment and the same opportunities within that environment for work and rehabilitation. For women, correctional conditions were varied and inconsistent in quality and availability. At times

these conditions were favorable to the inmate's correctional needs, and at times they were detrimental.

Transferred inmates are required to abide by the rules of the host institution, which are sometimes different from or in conflict with those of New Hampshire. For example, in Connecticut, at the time of the lawsuit, out-of-state inmates were ineligible for employment outside the prison grounds even if permissible in their state system. Inmates were also restricted to whatever work or treatment opportunities existed in the host institution. In Rhode Island, one New Hampshire female inmate's only employment was folding sheets for 10 minutes a day. She did not have a classification hearing at the host institution and was held in maximum security from the time of her arrival (Fiandaca v. Cunningham, Mem. Order, 1987).

As discussed in Chapter III, classification is an important issue in prisons. The security level of an inmate determines all institutional assignments, including treatment. Maximum security classifications are the most restrictive--often precluding participation in any prison program. Failure to properly classify an inmate can result in a loss of opportunity for treatment, work, and recreation, and can restrict visitation privileges. According to expert testimony presented at the trial, "long-term female inmates have special needs and do not need maximum security like males do" (Fiandaca v. Cunningham, Mem. Order, 1987:8).

Having a classification hearing at the host institution, still did not ensure that transferred inmates would receive a job assignment. One reason for this was that the state prison did not always forward information on length of stay or on the classification

guidelines that applied in New Hampshire. As a result, the information needed to conduct a classification hearing to determine the custody rating and job assignment was missing. Although this problem was reported to have been resolved prior to the lawsuit, inmates still believed they were overlooked for job assignments as a result of this (Deposition of Edda Cantor, 1984).

Opportunity for Work and Compensation. Gender disparities were also found in opportunities for work and adequate compensation. Men at the state prison were provided with work opportunities that were not available to the women. Additionally, male inmates were paid a minimum of 85 cents a day even for days they did not work. The average pay for males was \$1.50 a day but, with bonuses and overtime, men could earn as high as \$2.50 a day.

Women could only work and receive compensation in accordance with the availability and rules of their host institution. In one of the more extreme examples of inequity in work and compensation, the court cited the case of a woman inmate in a county facility who worked from 7:00 a.m. until 7:00 p.m., 7 days a week, in the laundry. Her compensation was 3 packs of cigarettes a day. Furthermore, she would only be allowed this work opportunity if none of the county inmates wanted it (Fiandaca v. Cunningham, Mem. Order, 1987:5).

Treatment Services. Like incarcerated women nationally, women prisoners in New Hampshire have considerable mental and physical health needs. At the time of the lawsuit, the main form of therapy they received was the counseling provided by their caseworker, who had a Master in Counseling Degree. County inmates were visited twice

a month, and out-of-state inmates were only seen once or twice a year, if at all. The caseworker could consult with the prison psychologist or psychiatrist, but they did not provide direct services to inmates. Their availability was limited to monthly consultation with prison staff. No group counseling was available and individual counseling could range from 10 minutes to 2 hours. Long-term therapy was not provided in the prison budget, and the State could not force the county to provide treatment. As a result, treatment services were inconsistent and arbitrary. Where one county facility provided weekly counseling with a psychologist out of its own budget, another denied a female educational tutoring because of limited staff and concern that it would be viewed as her being given extra privileges.

Out-of-state inmates were more likely to be participating in formal treatment programs at their host institutions, since this was generally part of the reason for their transfer (Deposition of Edda Cantor, 1984; Fiandaca v. Cunningham, Mem. Order, 1987). Given the limited availability of treatment programs in New Hampshire, female inmates often had to choose between treatment or maintaining contact with family. Two of the plaintiffs in the Fiandaca lawsuit, who were sentenced on drug charges, requested placement at the federal prison for women in Aldersen, West Virginia so they could participate in the drug treatment program available there. However, requesting this placement meant that one of the inmates would be leaving 2 young children in New Hampshire. Partly as a result of domestic conflict, and partly because of her physical distance from her family, she had no phone calls or visits during her out-of-state commitment.

Visitation and Family Contact. Probably the most severe hardship experienced by inmates transferred out of state or even to a different county that is a long distance from home was that of visitation. Of the 7 inmates who filed the original lawsuit, and who were confined in a county facility, only 2 had received visitors (Case Notes on Plaintiff Visitations). Even telephone calls were an expense and had to be limited (Fiandaca v. Cunningham, Mem. Order, 1987). Limited visitation and telephone contact is particularly difficult for inmates with children. Consistent with the national profile of incarcerated women, over two-thirds of the inmates named in the lawsuit were mothers. Some inmates may not be visited because of estrangement from their family or termination of parental rights, but many inmates do not receive family visits because of the distance (Fiandaca v. Cunningham, Mem. Order, 1987). There were additional complaints from those who were visited that visiting time was considerably shorter at their host institution than at the state prison (Letter to Warden Perrin, 1983; Caseworker Notes on Plaintiffs' Visitations).

Expert testimony at the trial noted that separation from children and difficulty surrounding visits added to the "emotional travail and worries of an inmate mother" (Fiandaca v. Cunningham, Mem. Order, 1987:8). Although maintaining contact with family has long been recognized as critically important to successful rehabilitation and reintegration for all inmates, it is particularly important to incarcerated women with children (Gabel, 1982). However, correctional officials in New Hampshire did not acknowledge this as a critical problem--referring to visitation as a "bogus issue" (Deposition of Ronald Powell, September 30, 1986), and expressing skepticism over the importance of visitation (Concord Monitor, October 17, 1984:2). For example, a

newspaper interview with a young female inmate, sentenced to 2-to-7 years and confined at a county facility while waiting appeal of her transfer to an out-of-state prison, reported that she was worried about family visits. She had a husband and 3 children and was particularly concerned that her mother, who didn't drive, would have difficulty getting to Massachusetts or Connecticut if she was transferred. When the then Deputy Commissioner of Corrections was asked for his response to this concern he replied: "If her mom can get from Manchester to Boscawen, her mom can get from Manchester to Framingham. It's not that different" (Concord Monitor, October 27, 1984, p. 2).

Isolation. The issue of visitation is linked to the broader issue of isolation that was discussed in Chapter III. Inmates sent out of state or to county facilities far from their homes experienced even greater isolation than ordinarily occurs with incarceration. Aside from the isolation from family and friends, women inmates, particularly if they were transferred to another state, felt isolated from other inmates. A common complaint was that they were treated differently from in-state inmates, passed over for job and other opportunities, and were "sometimes ostracized by inmates" (Concord Monitor, October 27, 1984, p. 2). This may occur, in part, because of the host institution's concern that transferred inmates not be perceived by other inmates as receiving special treatment. Efforts to avoid favoring one class of inmates may result in their receiving harsher treatment. For example, one inmate committed to Massachusetts, asked if her crafts could be sent to New Hampshire and be sold at the prison store. She was denied permission because there was concern that other inmates would think she was being given preferential treatment. According to expert testimony offered at the trial, New Hampshire women are



"just tolerated in out-of-state facilities, and those who act up are transferred out of the facility" (Fiandaca v. Cunningham, Mem. Order, 1987:8).

Transferred inmates complained of feeling isolated from the New Hampshire correctional officials as well. Due to the distances involved, the expense of long-distance travel, and a high caseload, out-of-state inmates were rarely seen in person by their caseworker. Communication was mainly through staff rather than directly with the inmates. Inmates were not allowed to make collect calls to New Hampshire, even for the purpose of speaking with their caseworker (Deposition of Edda Cantor). The combined problems of lack of visits and phone calls from family and friends, feelings of exclusion from other inmates at the host prison, and the lack of regular contact with prison officials in New Hampshire caused their caseworker to describe these inmates as feeling "banished" (Deposition of Edda Cantor, 1984).

Legal Assistance. An additional disparity in the correctional conditions of female inmates was their limited access to legal assistance and to a law library. Distance from the state prison's law library restricted its use by female inmates. County resources were less adequate, and out-of-state institutions are unlikely to have books on New Hampshire law. The Fiandaca court order found that access to legal aid was difficult, at best. According to testimony from their caseworker, inmates in county facilities could write to the prison attorney. If he deemed it appropriate, he would mail a copy of the law in question back to them (Deposition of Edda Cantor, 1984; Fiandaca v. Cunningham, Mem. Order, 1987). The adverse consequences of inadequate legal resources are broader than just the practical hardship created for inmates. Research has found that access to legal aid is an important

factor in inmate rehabilitation, as well, by helping inmates develop a sense of personal control and facilitating self-esteem (Noblitt and Alpert, 1979)

Parallels Between Pre-Fiandaca Conditions for Female Inmates and Pre-Laaman Conditions for Male Inmates. Many of the conditions the female inmates experienced were comparable in nature to those of the male inmates that were identified in Laaman. The Laaman Consent Decree ordered the state to provide the male prisoners with meaningful work and appropriate compensation, adequate visitation, appropriate classification, written policies and rules, consistent and impartial procedures, improved communication, reduced isolation and idleness, and adequate mental and physical health services with trained and credentialed staff. Although these problems had been addressed for male inmates, they continued to exist for female inmates.

Even after a proposal was accepted in 1983 to create a social work position exclusively for female inmates (Proposal for Social Worker Position Exclusively for Women Inmates, July 26, 1983), little relief occurred because the position was staffed at half-time. As a result, the excellent ideas it contained for program development for inmate mothers, such as developing a cottage industry that would bring piece work into the county institutions for the female inmates, and coordination of services with outside agencies to facilitate the use of volunteers to work with female prisoners were never implemented due to the time demands of routine casework services (Deposition of Edda Cantor, 1984).

Given the context of the conditions under which women prisoners were living, and the successful litigation of prison conditions by male inmates in the Laaman case, it was

almost inevitable that the women inmates would come to define their situation as unfair and discriminatory.

On June 14, 1983, 7 state-sentenced, female inmates confined at the Rockingham County House of Correction and Jail, sent a letter to the warden at the prison regarding the conditions of their confinement. Their letter identified 19 specific services they felt "entitled" to as state prisoners. These included the following: contact visits, without age restrictions and of longer duration; meaningful work and just monetary compensation; permission to carry \$8 a week in cash; opportunities for work release, furloughs, conjugal and family visits, and other programs in the community; a fully stocked commissary; vending machines on the "block"; more educational and rehabilitative programs; improved quality of and communication regarding medical, dental, and ophthalmological services; more recreation and entertainment, including field trips and cookouts; opportunities to make and sell crafts; permission to wear their own clothes and have a storage locker for their clothes; dietary changes such as more fresh fruit, fresher meat, and provisions for vegetarian and low calorie diets; the prohibition of mass lockdowns or personal lockdowns without an investigation; more time off the "block"; access to an up-to-date law library; the door to the female yard from the sentenced block kept open allowing entrance to the yard at will; pictures taken for family distribution; electric power on all evenings; and permission to have personal televisions and tapes (Correspondence from female inmates to Warden Perrin, June 14, 1983).

Six days later, Warden Perrin wrote to the Superintendent of the Rockingham County House of Correction and Jail in response to this letter. He asked the

Superintendent to convey to the inmates that the conditions they identified in their letter reflected rules, policies, programs, facilities, and supplies that are regulated by the jail, and that female inmates are placed there temporarily until they can be sent out of state. As a result, "their programming can be delayed until they are transferred to a facility which provides for the programming." In closing, he offered the following suggestion for handling the inmates' complaints: "It is recommended that individual state prison inmates housed at your facility be counseled that it is in their best long-term interests to try to behave as well as they can while temporarily lodged at your facility so that their behavior patterns while there do not interfere later with a suitable placement at a long term confinement facility" (Correspondence from Warden Perrin to Superintendent Courtney, June 20, 1983).

On the same day this letter was dated, a suit was being filed in federal district court on behalf of the 7 inmates as plaintiffs. The defendants were the warden and deputy warden of the state prison. In November of the same year, a motion was filed and subsequently approved to certify the original action as a class action, consisting "of all women prisoners who have been or will be sentenced to the New Hampshire State Prison and/or remanded into the custody of the Warden of the New Hampshire State Prison wherever housed" (Motion for Class Action, Civ. Act. No. 83-400-L). The basis of the lawsuit was the violation of the inmates' rights to equal protection under law as a result of the gender discrepancies in programs, services, facilities, and conditions of confinement.

Fiandaca v. Cunningham

The specific deficiencies that were cited in the lawsuit include the following: "lack

of equal visitation privileges, same access to counsel, same immediate access to their case managers, cost of long distance telephone calls, lack of access to a prison attorney, lack of equal classification, recreational facilities, equal rights to compensatory pay, right to refuse onerous jobs (Ex. laundry 7:00 a.m. to 7:00 p.m.), right to be subject to the rules solely of the New Hampshire prison, access to law libraries, the right to appear at periodic classification, equal educational rights and equal rights of grievance, pre-release services and facilities, and lack of the same commensurate treatment that the males experience" (Fiandaca v. Cunningham, Mem. Order, 1987:13-14).

Following the lawsuit, several unsuccessful attempts were made between both parties to reach a negotiated settlement. On August 1, 1986 the State offered to settle the case. It agreed to establish a prison at the Hillsborough County House of Correction, which it was in the process of trying to lease from the county. Contingent upon funding and completed renovations, it anticipated the prison opening by the end of 1989. This offer was rejected because the prison would not be established for 3 years and was contingent upon the ability of the County to relocate its inmates (Fiandaca v Cunningham 827 F.2d 823 (1st Cir. 1987)).

A second offer to settle was made by the state on October 21, 1986 to establish a prison by June 1, 1987 using the Speare Cottage at the Laconia State School. This was also rejected. The Laconia State School, which was involved in litigation against the state several years earlier (Garrity v. Sununu No. 78-116-D (D.N.H. filed April 12, 1978)), was represented by the same counsel as the Fiandaca plaintiffs--New Hampshire Legal Assistance (NHLA). Converting the Speare Cottage to a women's prison would have

displaced its residents and violated the remedial order enacted in Garrity. The reason stated by NHLA for rejecting this offer was the unwillingness of the plaintiffs to "agree to an offer against the stated interests of the plaintiffs in Garrity class" (Fiandaca v. Cunningham 827 F.2d 823 (1st Cir. 1987)).

When this offer was rejected, the State filed a motion charging NHLA with conflict of interest because of their representation of the residents of the Laconia State School (LSS). Additionally, a second motion was filed by the New Hampshire Association for Retarded Citizens, Inc. (NHARC), on behalf of the residents of Speare Cottage, seeking to intervene in the remedial phase of the litigation. Both of these motions were denied and an 8 day trial was held.

Following the trial, a decision on the merits of the case was withheld to allow both parties an opportunity to settle the case. One week later, a settlement agreement was reached to establish the prison at the Laconia School by November 1, 1987 with appropriate placements of the residents being insured.

However, after the plaintiffs agreed to sign the settlement, the state refused to do so and a joint settlement conference was convened. At that conference, the original settlement agreement was withdrawn and both parties agreed to continue negotiations. When they failed to reach a settlement, the court announced its decision (Fiandaca v. Cunningham, Mem. Order, 1987:13) on January 13, 1987 that:

The conditions of confinement, and programs and services provided to New Hampshire female state prisoners incarcerated in County Houses of Correction or out-of-state correctional facilities are not equal to or on parity with that to be provided to male inmates at the New Hampshire State Prison....Female state prisoners experience conditions of confinement

different than and inferior to that for male inmates at the New Hampshire State Prison based solely on their gender.

As a result, the court issued the following order:

The defendants on or before November 1, 1987 shall have available for housing the following: a building comparable to the Speare Building for the plaintiffs. Housing shall not be located at the Laconia State School or its environs.

A permanent facility comparable to all of the facilities encompassed at the New Hampshire State Prison shall be constructed and available, to be inhabited no later than July 1, 1989.

Following the court order, the State and the NHARC appealed the denial of their pretrial motions. The appellate court affirmed the lower court decision that the state violated the plaintiff's equal protection rights. The remedial order, however, was vacated and remanded for retrial on the issue of remedy with the NHARC being allowed to intervene in new proceedings (Fiandaca v. Cunningham 827 F.2d 823 (1st Cir. 1987)).

Negotiations resumed, and it was finally agreed that the state would construct a facility for female prisoners at the Hillsborough County House of Correction in Goffstown. Throughout these proceedings, female inmates continued to be housed out of state and in county facilities. Although the original court order required the prison to be established by July 1, 1989, due to unavoidable delays, it did not officially open until November of that year (Plaintiff's Motion for Attorneys' Fees and Costs). It is interesting to note that the prison opened at the same time and in the same location as was offered by the State in the first round of negotiations 6 weeks after the lawsuit was filed.

It has been almost 5 years since the establishment of the women's prison. The Fiandaca legal action resolved some, but not all, of the concerns raised by inmates.

Legally, women prisoners have been provided with conditions that have parity with men prisoners. A fundamental question that remains unresolved is whether parity, as a legal concept, provided the incarcerated women with the correctional reform they were seeking through litigation. The next section will examine some of the issue unresolved by the lawsuit and the current needs and correctional conditions for female inmates now that a prison exists.

#### Issues Unresolved by Fiandaca

Almost one year after the ruling to establish a prison, but before the prison was completed, the court received a letter of complaint about confinement conditions signed by 21 female inmates. These state-sentenced inmates were confined in an area of the Hillsborough County House of Corrections while it was being renovated for occupancy as the new prison. Male county inmates were still confined in this facility while a new jail was being constructed for their occupancy.

Their complaints centered on a faulty heating system that caused the temperature in the prison to be between 40 and 50 degrees resulting in illnesses:

We are sleeping under 4 and 5 blankets. We see our breath! The windows in the cell are ice covered. Women are huddled in blankets, sitting on the tier to watch TV. Many are sick with colds, sore throats, coughs and probably pneumonia [sic]. We must remain in bed all day if we want to stay warm. Ever since September there has been one problem after another with the heating system.

We have had 3 major floods of rooms when the county system--without a regulator--heated our locked rooms to 135 degrees & set off sprinkler systems. (I know the regulator is an expensive part & that neither county or state wish to pay for it) The women were awakened by hot water spraying the entire room in the middle of the night....it is now December 26th and we have no heat...Maintenance men are called....they flip a switch,



go home, and we are left with blowers circulating freezing cold air!! And they are not called back to correct the horrible situation!! Staff members are wearing their winter coats, while inmates are not allowed theirs. Everyone is so miserable because of the extremely cold temperatures.

The women referred to being "warehoused," and being "abandoned" by their attorney who withdrew from the case when it was certified as a class action suit. They stated:

We are grieving the fact that as of 12/26/88 we have no state rights (visits, counseling, vocational training, visiting restrictions to 5 people ever on your list, no packages, children's visits 1 hour on Sat. only, our clothes are county rags, we never go outside)....the state women are being housed with pretrial women (who are not even being "quelled" for bugs, lice, etc. as is the practice in most places) & county women. We are a mixed group of individuals, but we all have our rights, and they are being flagrantly violated (Female Inmates' Letter to Judge Loughlin, December 26, 1988).

The court visited the county facility and consulted with representatives for both parties. The State informed the court that the heating problem was corrected. In response to the inmates' complaint about visits being restricted to 5 people "the Court was assured that this is not cast in stone and that it can be changed at the inmate's option." Vocational training was discussed and the court was informed that this was contingent upon the budget passing. Inmate complaints about a lack of proper clothing, being unable to go outside, and limitations on childrens' visits resulted in the assurance that "new clothing has been ordered and should be received within two weeks. Efforts will be made for outside recreation time, although present weather conditions militate [sic] against this...[the policy regarding childrens' visits] will be similar to the policy now enforced at the New Hampshire State Prison for men." The court was unable to address the grievances surrounding the comingling of pretrial and sentenced populations because "[T]he Court

has no jurisdiction relative to pretrial detainees. It has been the policy of the federal government to have its pretrial detainees incarcerated at the New Hampshire State Prison or local county jails." The consultation concluded with the Court noting that "[O]n the negative side, it does not appear that full compliance will be made with this Court's order until July 1, 1989. On the positive side, vocational training facilities are in the process of becoming extant" (Court's Visitation and Consultation With Plaintiffs' And Defendants' Representatives, December 29, 1988).

This consultation illustrates some of the difficulties of legal reform and reliance on legal remedies. Legally, the court's jurisdiction is restricted to the issues addressed in the court order. The available evidence does not suggest that the court is indifferent to the confinement conditions of the women under state sentence. The numerous status conferences and hearings that were held indicate the court was actively working within its jurisdiction to insure that their grievances were heard and addressed and to insure compliance with its orders. However, some of the issues concerning the female inmates reflect the dilemma of remedies based on demands for special needs versus equality. An example of this is provided by the issue of visitation privileges, particularly children's visits. It is not within the jurisdiction of the court order to address whether the male inmates' visitation policy is appropriate for female inmates. The court can only solicit assurances that the policies will be "on parity with those provided to male New Hampshire state prisoners" (Fiandaca v. Cunningham, Final Order, September 23, 1992).

Another example is found in the issue of heterogeneous populations that was raised by the inmates in their letter complaining of being confined with pretrial detainees.

It is beyond the court's jurisdiction to address the correctional appropriateness of co-mingling these classes of offenders. It was specifically noted at the conference convened to address the inmate's complaints that this policy is consistent with correctional policy at the men's institution (Court's Visitation and Consultation With Plaintiffs' and Defendants' Representatives, December 29, 1988). The fact that men in the state prison had more institutional space that afforded them some physical separation from newly admitted inmates in comparison to the small confinement area in which the female inmates were held was not identified at this conference as being legally relevant. In essence, the law is providing the most complete degree of relief that it is possible for it to provide. It is beyond its providence to determine whether this relief is appropriate to the recipients--that is a matter to be determined by prison administrators (Alpert, 1976:656-657). The court's intervention is limited to the issue of whether the relief meets the standard of parity. In May of 1992, this issue was addressed in a letter from the attorney that represented the inmates in Fiandaca to one of the plaintiffs. She stated:

Over the last few years, I have toured the Goffstown facility on several occasions and met with many of you to determine whether the services and conditions provided to the women inmates are on parity with those provided to the male New Hampshire inmates. Although I am aware that many of you still have concerns about the medical services provided by the state of New Hampshire, it is my opinion....that the conditions about which you have concerns are conditions which, unfortunately, also exist for the men.

Because there is nothing in the Fiandaca complaint which permits action on problems common to both male and female inmates, I have filed a Motion for Final Order in that case (Letter from Diane Smith to Ana Pelton, May 6, 1992).

Whether the care and programs offered at the prison are appropriate or adequate

for women is a separate issue than whether they are on parity with that available to men. If they are on parity, their appropriateness is an issue for correctional administrators to determine. When prison conditions are abusive, legal theories other than equal protection violations, such as constitutional protections against punishment that is cruel or unusual, can be used to challenge them. However, it is difficult to challenge correctional conditions that fall short of either equal protection or cruelty standards. Courts have been, and still remain, extremely reluctant to interfere with the authority of correctional administrators in operating correctional facilities.<sup>13</sup>

Before the prison was even created, the female inmates were experiencing the limitations of legal reform based on parity. The complaints outlined in their letter to the court illustrate Daly's observation that "formal legal equality of women with respect to men cannot provide substantive equality" (Daly, 1990:10-11).

#### Post-Fiandaca Correctional Conditions--The Impact of Legal Remedies on Justice Policy.

The emergent question underlying this study is how legal remedies affect justice policy. This section will examine the extant programs and conditions that have resulted from the Fiandaca case. It will compare programming and services at the women's prison with those available at the men's prison in order to develop a better understanding of the practical application of a parity standard in women's corrections. It will also examine the adequacy of a parity standard as the basis for creating a prison program from the inmates' perspective.

In order to understand the practical meaning of parity in a correctional setting, the

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<sup>13</sup>See Introduction. This issue is discussed in relation to the "hands-off doctrine."

programs and services currently provided at the men's and women's prisons will be presented. This is based upon the Department of Corrections Biennial Reports and the non-binding State Plan submitted to the court, as part of the Fiandaca ruling, that outlined the services and facilities being planned for the prison (Report of Status Conference, April 7, 1989, Docket No. 179, Plaintiff's Exhibit No. 3). Determination of the correctional needs of the female inmates and their perceptions of the adequacy of prison programs is based upon their responses to interviews recently conducted at the women's prison as part of a social and legal needs assessment (Franklin Pierce Law Center, 1993). Inmates were asked to rate the quality of current prison programs, facilities, and services, as they perceived it, on a 10 point scale from bad to good.

The areas of legal reform Fiandaca addressed are the following: medical and health services; legal assistance that includes access to a law library; access to a case manager (i.e., staffing issues); classification; work and compensation; recreational facilities; educational opportunities; grievance rights and procedure; equal visitation privileges; and, treatment commensurate with males.

Medical and Health Services. Health services at the women's prison are coordinated with those at the men's prison (Biennial Report, 1990-1992:59-60). The women's prison has a physician who is available on-site for half-a-day on Mondays. The prison does not provide an on-site staffed and equipped infirmary, an ambulance on the prison grounds; or round-the-clock emergency medical care (Correspondence from Attorney Robin Boots to Attorney Diane Smith, August 12, 1991). Inmates requiring inpatient care are sent to the Health Services Center at the men's prison. Inmates requiring

emergency medical care are transported to local hospitals. There are daily medical calls except on weekends, and nurses and nurse practitioners are on staff at the prison (Franklin Pierce Law Center, 1993:22).

Medical and health services at the men's prison are provided by the Health Services Center. This center operates 7 days a week, 24 hours a day and provides emergency and routine medical services for the prison (Biennial Report, 1988-1990:47). Technically, it is the health service center for the entire system. However, since it is located at the men's prison, the male inmates have more readily available access to its services.

In contrast with the impact of the Fiandaca case on medical services at the women's prison, the Laaman Consent Decree requires the men's prison to provide medical staff on-site and a physician to be on-site or on call, 24-hours a day, 7 days a week, and the establishment of a chronic care clinics for asthma, diabetes, seizure disorders, hypertension, and chronic pain syndrome (Laaman Consent Decree). Fiandaca does not provide for the establishment of such clinics. Furthermore, the policy of the women's prison for chronic care conditions requires that it not be a preexisting condition, there must be indications of deterioration if untreated, or it must be causing the inmate to be in pain (Correspondence, Attorney Boots to Attorney Smith, August 12, 1991).

According to the Needs Assessment, 67% of the women identified themselves as having a medical condition. Thirty-nine different medical conditions were identified ranging from AIDS and cancer to back problems. Almost 90% of the respondents rated the medical services provided by the prison as ranging from acceptable to bad, with 40% rating them as bad (Franklin Pierce Law Center, 1993:15-16). Inmate complaints centered

around the inability to obtain treatment including difficulty in getting diagnostic tests ordered and long delays in obtaining necessary surgery; quality of medical care which included inaccurate diagnosis of complaints, long waits for medical attention, indifferent and callous attitudes and demeanor of medical staff; and difficulty in obtaining medication, even that which is life-sustaining. Some specific examples provided by the inmates include the following (Franklin Pierce Law Center, 1993:21-22):

- one inmate had to wait 4 days to get kidney detoxification medication.
- one inmate waited one and a half months for an x-ray after falling
- one inmate had to wait 6 months for necessary surgery.
- a woman with a heart condition was left gasping for 20 minutes without help because the correctional officer did not believe she had a problem.
- an inmate with AIDS and cancer was not receiving all of her prescribed medication.

The attorney for the inmates in the Fiandaca case drew a distinction between "general complaints about the medical conditions," which exist for male inmates as well as female, and parity issues surrounding medical conditions (Correspondence, Attorney Smith to Ana Pelton, May 6, 1992; Hearing Before The Honorable Martin F. Loughlin, May 5, 1992:35). According to the State's attorney, there is parity of medical services because all inmates are treated at the Health Services Center and all are treated the same way. He did not interpret the ruling of parity as requiring the establishment of a separate medical facility at the women's prison: "I don't believe that we are Constitutionally compelled and I don't believe it makes economic sense to build a facility for a hundred people down in the Goffstown area, just like it doesn't make sense for us to build a facility for the people who are housed in Laconia. We have one facility for the entire system" (Hearing Before The Honorable Martin F. Loughlin, May 5, 1992:23).

Mental Health Services. "The Mental Health Department is responsible for providing individual counseling, self-help education, AA and NA 12-Step meetings, and a Compulsive Spenders group...Approximately 70% of the prison population participate in treatment programs" (Biennial Report, 1990-1992:29). There are two Psychologists/Social Workers on staff at the prison.

There is a Division of Medical and Forensic Services that encompasses mental health services for the entire system. The Mental Health Unit consists of a Ph.D. level Chief of Mental Health, 3 psychologists, and 3 social workers. There is a sex offender program, an anger management program, a special needs group, and a Secure Psychiatric Unit. Like the Health Services Center, these programs and the Secure Psychiatric Unit are located at the men's prison. In 1991, there were 103 male and 12 female admissions. In 1992, the number of male admissions decreased to 82, while the number of female admissions increased to 24 (Biennial Report, 1990-1992:64).

At the women's prison, 16% of the female inmates report a history of mental illness, 64% of which identified their illness as depression. Almost two-thirds (62%) of the inmates rated the mental health services as bad, and 60% rated the psychological or counseling services as bad. The specific complaints were insufficient number of counselors, inmates have to initiate counseling sessions and then requests are not immediately responded to, lack of confidentiality because files are open to the parole board, dissatisfaction with the way medications are prescribed and managed, and lack of availability of psychiatric services (Franklin Pierce Law Center, 1993:16 and 25).

Drug/Alcohol Services. The primary drug and alcohol programs offered at the



women's prison are A.A. and N.A. Since 1990, the Department of Corrections has operated a residential treatment program, Summit House, that is available to male and female inmates. Twenty-nine inmates have successfully completed the program offered at Summit House (1990-92:34-35). As of June 30, 1992, 11 state sentenced women were enrolled in the treatment program.

Slightly over two-thirds (69%) of female inmates said drugs or alcohol had interfered with their ability to function in life, and 42% were participating in a drug or alcohol program in prison. Of those, half (51%) rated the effectiveness of the programs as acceptable to good, and only 12% rated the programs as bad. The complaints that were made were that there needed to be more programs, meetings, and counseling on drugs and alcohol. Some inmates were unable to participate in programs because of their classification, and some complained that meetings are too large in number and groups sessions aren't kept confidential. One other complaint was the lack of a detoxification period to help addicted women come off drugs gradually (Franklin Pierce Law Center, 1993:17-18 and 24-25).

Grievance Procedures. Most of the inmates (88%) were aware of the grievance process but only 20% had used the procedure. Of those, slightly more than half were dissatisfied with the process. The reasons usually given to illustrate this dissatisfaction was that of "subtle repercussions" from correctional officers and the administration for using the process. Maybe because of this dissatisfaction, 93% of the respondents identified a need for mediation at the prison, and 68% indicated an interest in being trained as mediators (Franklin Pierce Law Center, 1993:19).

Given the small number of inmates, the women's prison provides an excellent opportunity for experimenting with a more diffused form of decision-making and dispute resolution than is provided in a traditional penal institution. This would allow the inmates to assume more control over their environment and themselves, teach them valuable life skills, and prepare them to re-enter society with an improved sense of self and with confidence in their ability to solve problems. There is no comparable model for this at the men's prison--the women's prison would need to move beyond a parity standard and think innovatively about its population, its institutional environment, and its ultimate objectives.

Legal Assistance. The state prison for men has a law library of 6,138 volumes and a librarian familiar with their use and with basic principles of legal research in order to assist the inmates. The objectives and operation of the law library were established in the Laaman Consent Decree (Biennial Report, 1990-1992).

Slightly over two-thirds of the female inmates rated the legal assistance available to them in prison as acceptable to bad; and 40% of the inmates rated it as bad. Inmates complained about difficulty in using law books, in obtaining assistance from the attorney that is available to them from the department of corrections and that there is not an attorney available at the women's prison, irregular and inconsistent scheduling for the attorney visits to the women's prison, and difficulty in understanding the legal terms used by the attorney (Franklin Pierce Law Center, 1993:20-21).

Education. The State Plan (1989:6-7) provided for one full-time teacher for GED preparation and testing, practical skills, enrichment, remedial work, and testing. The program was planned to operate on a 6-week to 8-week cycle with open entry.

Computers, computer-assisted instruction, textbooks, instruments, a VCR and movies were to be available.

There are 2 teachers on staff at the women's prison (1988-90:62). The education program provides individual tutoring, GED preparation, high school diploma, ESL, enrichment, learning-disabled, and post-secondary education. Literacy is fostered through CONNECTIONS, a library-based humanities reading and discussion program for new readers. Castle College offers an electronic classroom program, and two certificate programs--one in Business Technology and one in Human Potential which is a substance-abuse education program (Biennial Report, 1990-1992:30). There is a library with educational and recreational materials, magazines, newspapers, and musical cassettes.

The men's prison offers four 11-week terms annually. The Education Center provides academic and vocational interests and aptitude testing and classes at a range of academic levels encompassing a range of needs such as basic and intermediate reading, literacy, and arithmetic skills; ESL; secondary-level instruction; life skills; business and computer related skills; and GED. Approximately one-third of the inmates are enrolled in the Education Center. Secondary courses receive high school credit, and post-secondary courses are available. New England College offers an Associates Degree in liberal studies, as does New Hampshire Technical Institute in Business Management. Castle College offers a certificate in Business Technology. The library has a collection of 8,005 books. There are 22 teachers on staff at the men's prison (Biennial Report, 1990-92:15-18).

Almost half the inmates at the women's prison (48%) have a high school diploma, and 21% have had some college. However, half the inmates still have less than a high

school education (Franklin Pierce Law Center, 1993:17). Slightly fewer than two-thirds (64%) of the inmates rated the educational program as acceptable to good. The criticisms directed against the program included the following: there were not enough college-level classes; extant college classes were not challenging and were limited to secretarial, business, and office skills; learning disabilities were not accommodated; inmate teachers were not qualified to teach; there was no bilingual education; GED preparation was inadequate; there was a lack of personal instruction (Franklin Pierce Law Center, 1993:23).

Vocational/Job Training. The women's prison provides an Office Occupations Program that is skills-based in the areas of word processing, typing, office procedures, filing, proofreading, letter writing, and calculator use. It also includes personal development and skills for finding and keeping a job.

There is also an Industries Program that provides "work opportunities by operating the Data Processing Program...[which] contracts with other state agencies, such as the Fish and Game Department to generate and maintain customer database files." Twelve inmates are employed full-time and 10 part-time in the Industries Program. Training skills are in 3 areas, Data Entry Clerk, Computer Operator, and Computer Programmer. There are 4 Shop Supervisors and/or Tradesman on staff at the women's prison (Biennial Report, 1990-1992:31).

Vocational Training at the men's prisons is conducted in Industries, the Bureau of Services, the Security Bureau, and in T.I.E. (Training, Industries and Education) and includes training in data processing, technical education, woodworking, maintenance

work, horticulture, auto mechanics and repair, small engine repair, business management, industrial arts, building trades, and culinary arts. The prison operates plate, print, sign, data processing, tailor, light bulb assembly, office furniture, and wood shops, and a farm. Each shop operates two shifts, and inmates work five hours a day. Correctional industries supply products to state agencies, cities, town, schools, colleges, and other organizations. It operates at a profit which is turned into the General Fund. Over 500 inmates participate in the industries programs, and college level training programs are available through the New Hampshire Technical Institute. Many of the programs are accredited by the New Hampshire Department of Education. There are 39 Shop Supervisors/Tradesman on staff at the prison.

Over half the inmates (51%) at the women's prison rated the job training at the prison as bad. Specific complaints centered around the emphasis on secretarial and office work, the training was not perceived as offering marketable skills, opportunities for job training were seen as inadequate, and training required a GED (Franklin Pierce Law Center, 1993:25).

Eighty-six percent said they planned to work following release, but over half the inmates (57%) said they did not have any job prospects. Fifty-eight percent said they did not have anyone to help them with a job search, and 85% said they would accept help in finding a job if it were available. Most of the inmates felt qualified to do some type of work, and 48 different occupations were listed, the most common being nursing, data entry, office work, and electronics (Franklin Pierce Law Center, 1993:50-51).

Recreation. The State Plan identified outdoor recreation--softball, exercise area,

basketball, volleyball, and badminton; and, indoor recreation--exercise equipment, card and board games, aerobics; and hobbycrafts, at the women's prison. The biennial report (1990-1992: 32) identifies volunteer services in "coaching for league and leisure sports (softball, basketball, and cross-countryskiing). Volunteers instruct aerobics classes, lead a women's writing group, teach painting, and lead a women's chorus." There are no recreational personnel listed for the Women's Prison (Biennial Report, 1990-1992:66).

Recreational activities for men include: video games; magazines; guitars; television; photography; intramural sports--horseshoes, racquetball, softball, volleyball, basketball, handball; ping pong; pool; universal gym, weightroom and training which includes power lifting and body building; holiday tournaments; concerts; holiday parties; hobbycrafts, such as woodworking, leather craft, pottery, ceramics, arts and crafts. The recreation program is self-supported by profits from the canteen, vending machines, and other commissions. There are 2 staff positions for recreation (Biennial Report, 1990-92:10-11 and 62).

Almost two-thirds (64%) of the female inmates rated the prison as acceptable to bad in "filling the time." Their major complaints were insufficient activities, and only television was available for leisure (Franklin Pierce Law Center, 1993:23).

Classification. According to the State Plan, women inmates are classified on a scale of 1-5. This indicates their security level, which, in turn, affects their housing and work assignments. The scheme is as follows: (1) a C-1 classification is assigned to a half-way house; (2) a C-2 is assigned to the Women's Prison with access to outside areas beyond the fence, including the outside work crew. C-2's are housed in dorms; (3)

classifications C-3 and C-4 are assigned to the Women's Prison but housed in separate wing from those classified as C-2; and (4) a C-5 classification is maximum security. According to the State Plan "C-5 prisoners will be housed in an appropriate facility. There has never been a C-5 woman prisoner in NH" (Report of Status Conference, Non Binding State Plan, 1989:4)

According to the inmates, 19% were not classified; 26% were classified C-2; 36% were classified C-3; 3 inmates were classified C-4; 2 did not know their classification; and 2 were in maximum security. Inmates did not appear to be dissatisfied with the classification system, 61% rated it as good, and only 15% rated it as bad with the rest falling in between. The dissatisfaction that was expressed identified favoritism in classification decisions; not understanding the classification procedure; classification being done informally by counselors and administration rather than by a Classification Board; and inmates classified for work release but not having work release be available. (Franklin Pierce Law Center, 1993:29)

Parenting Issues and Maintaining Family Ties. One of the dominant issue in women's corrections is that of parenting and family ties (Gabel, 1982). However, the State Plan does not address these issues, and they are not referred to in the 1988-1990 biennial report on the women's prison. Neither were these issues included in the long-range goals and objectives for the 1992-1993 biennium. The only service available appears to be a Parenting Group run by volunteers (Biennial Report, 1990-1992).

Seventy-eight percent of the inmates interviewed were mothers, and one inmate was pregnant at the time of the assessment. The total number of minor children of inmate

mothers was 137, with an average age of children of 8.3 years. This is consistent with national statistics shown in Table 12 which report 76.4% of incarcerated women are mothers of children under the age of 18 (Greenfield and Minor-Harper, 1991:6).

The majority of the children (66%) are living with relatives, and 29% of the inmates have legal custody of their children. (Franklin Pierce Law Center, 1993:35-41). Forty-four percent of the inmates rate their relationship with the people caring for their children as acceptable to bad, and 27% rate it as bad. Thirty percent rate their relationship with their children as acceptable to bad, and 15% rate it as bad.

Seventy-two percent of inmate mothers are permitted visitation with their children. However, slightly more than half the women said that nobody brings their children to visit. Fifty-four percent of those who do not receive visits from their children cited lack of transportation as the reason. Thirty-seven percent have had no visits from their children while at the prison, and only 26% said they have had weekly or "countless" visits with their children.

Inmates also complained that visits were too short and infrequent, and that bottles and diapers were not allowed in with visiting infants (Franklin Pierce Law Center, 1993:20). Although slightly more than one-third of the inmates (36%) reported that their children experienced difficulties in entering the prison, nonetheless, 46% rated the quality of children's visits as good, and 78% said that the children enjoyed their visits.

Eight-nine percent of the women said their visits were typically longer than one hour. Fifty-nine percent said they have phone calls with their children but privacy seems to be a difficult issue, and 73% said that more privacy would increase the quality of



telephone contact with their children (Franklin Pierce Law Center, 1993: 40-41).

Despite the high number of inmate mothers and the relatively high number reporting difficult relationships with their children or their children's caregivers, only 8 inmates reported having attended parenting classes (Franklin Pierce Law Center, 1993: 49). This may in large part be due to the fact that the parenting group is run by volunteers which may affect its availability.

Slightly more than half the inmates (55%) rated the prison as acceptable to good in maintaining family ties. However, of the remaining inmates, nearly one-third (31%) rated the prison as bad on this characteristic. The specific complaints included the amount of time it takes to clear family visits, poor lines of communication in arranging visits, limited availability of stamps and envelopes to correspond with family, limit on number of family that can visit, lack of provisions for infants to stay with mothers in the prison, and difficulty for children in making night visits. In fairness to the prison, separation from children is such an emotional issue that it is unlikely that inmates would ever be totally satisfied with any arrangements that exist.

This prison was created under the legal mandate of providing parity of services. Parenting issues are not included in any of the documentation on the men's prison. There are no statistics on how many male inmates are fathers in the biennial reports, nor are parenting programs for males identified in prison reports. Neither are there any references to visitation issues. Parenting was not identified as an issue in the Laaman Consent Decree.

Strictly speaking, the Department of Corrections is not under any legal requirement to provide services that improve parenting skills or facilitate maintaining

family ties. When asked at the time of the lawsuit what correctional practices exist to facilitate visits, former Commission Powell responded: "I don't see any particular obligation for someone who might be male or female, placed in a federal facility because of their behavior and their criminal history, I don't see from a sound correctional practice any particular obligation that the state has to bridge visitation to those facilities" (Deposition of Commissioner Ronald Powell, September 30, 1986, p. 31).

There is no standard for parity on this issue. In light of this, any programs or services or endeavors to facilitate maintaining family ties and contacts at the women's prison would have to be developed by that institution to meet the needs of its population. There is nothing in the creation of this prison that would prevent it from developing such programs were they deemed appropriate and necessary. By the same token, there is nothing under the Equal Protection Clause to mandate it either. Undoubtedly, visitation and family contacts are more available to inmates now that an in-state women's prison exists. However, in lieu of a correctional philosophy that looks beyond establishing minimum programs and services, and looks beyond the mandates of parity, legal reform will not insure that the parenting needs of incarcerated women will be met or even addressed by the prison.

The Adequacy of a Parity Standard. The limitation of a parity standard is particularly evident when examined in relationship to medical and health services. As previously stated, the women's prison does not have its own infirmary. All inmates, including those in half-way houses, who require infirmary services are sent to the Health Services Center at the prison in Concord. According to the Department of Corrections, in

accordance with a parity standard, the provisions at the infirmary are the same for male and female inmates (Transcript of Hearing Before Judge Martin F. Loughlin, May 5, 1992:16). The examples that follow illustrate how the prison's definition and application of 'parity of treatment' affected two female inmates at the Health Services Center.

A female inmate, suffering from a chronically debilitating neuromuscular disease, was hospitalized at a public hospital after collapsing at the prison. Despite being unable to walk, she was kept in leg irons secured to the bed while hospitalized upon orders from the prison. She was subsequently transferred to the infirmary at the men's prison in Concord. In an affidavit filed with the court (Affidavit of S. B., Plaintiff's Exhibit #7, p. 3-4), she described her experiences at the infirmary:

At the Concord facility, I was held in a cell in which I had little to no privacy. One wall consisted of large observation windows that opened onto the main corridor of the infirmary where male inmates constantly walked by. Only a portion of these windows were screened and at times there were no screens at all. My toilet facilities in this room were directly in front of the window and in full view of whatever male inmates happened to be walking by or were held in the adjoining cell. This particular room had an adjoining cell and, on at least two occasions, it was occupied by male inmates for approximately a week at a time. These males inmates had the ability to look directly into my room should I be using the toilet...I was kept locked in this small room for virtually 24 hours a day with nothing to do all day. I was not even allowed to have my television or personal radio, even though I saw that others had such things in their rooms. I was not allowed out of my room because of the security issues raised by having a women (sic.) housed in the men's prison. The only time that I was taken out of my room was to shower in the handicapped shower across the hall, or to occasionally walk in the halls or to make a phone call. All of this, however, was at the Correctional Officer's convenience, and was not very often....On my third admittance to the New Hampshire State Prison Infirmary, I have been held in an observation room for part of the time. This room has the toilet outside the room and facilities must be shared with the adjoining room, where there has been a male inmate held...When I asked to be put back in the room with the other woman because of the

toilet and privacy issue, I was told by a Registered Nurse that if I complain again, I'll be written up with another major disciplinary write-up.

Similarly, a female inmate with cerebral palsey was sent to Health Services in Concord for medical and physical therapy evaluation. Consistent with the rules and procedures that apply to male inmates who are admitted to the infirmary, she was subjected to a strip search which she described (Affidavit of C.D., May 28, 1992, Plaintiff's Exhibit #1):

When I first entered the infirmary on October 8, 1991 I was told that I must submit to a far more extensive strip search of my body than I had ever experienced at the New Hampshire State Prison for Women. This involved an anal and rectal search. I refused to participate to that extent [underline in original] and was then told I would receive a major disciplinary write up for such a refusal.

While in the infirmary, she received a copy of its rules and regulations. She was prohibited from "mingling with the male inmates," although she noticed "that they obviously could socialize with each other." As a result of this restriction, she "was locked in a very small room in isolation for 24 hours a day." She found the lack of privacy in using the toilet particularly stressful:

My room consisted of a bed, a toilet, and one full wall of observation windows that opened onto the main corridor in the infirmary. My toilet was located at the front of these first set of windows. The male inmate in the adjoining room had a window that looked into my room and from which he could view my toilet. There was frequently no screen in place during my stay. Male inmates who walked the halls could and did look in at me.

The lack of privacy in using toilet facilities is commonplace in the life experiences of males, who are socialized to be less sensitive to this issue. This is not true of female socialization. As a result, lack of privacy in the use of toilet facilities creates more stress

and hardship for females than it does for males.

These inmates, in addition to 2 others who were also disabled, sought legal assistance from the Disabilities Rights Center, Inc. (DRC) in grieving the medical services and treatment at the women's prison. The concept of parity, as it applied to these experiences, was discussed at a court hearing on the women's prison. At that hearing, the State's attorney explained that the Health Services Center (the infirmary) serves all correctional inmates: "We're treating all of the inmates the same way. We believe that it's not the men's infirmary, its the health services center for the entire system, and we believe that's on parity with--that the women are being treated on parity and that this action should be dismissed" (Transcript of Hearing Before the Honorable Martin F. Loughlin, May 5, 1992, p. 16).

Continuing his point, he drew a distinction between equality and parity: "...what the Court is hearing [from the DRC attorney regarding conditions at the women's prison that are inadequate for physically disabled inmates]...is not a parity issue, but it is...an equality issue. There was a bill before the New Hampshire legislature where the Disabilities Rights Center came and advocated that a statute be passed that women be treated equally with men. Obviously the state of the law in this country and the state of the law in the First Circuit is not equality but parity...parity means per capita...There are 1500 men inmates in the Department of Corrections and there are 105 residents at the state prison for women, 50 of whom are state women. It may be, in fact I'm sure that its true, that there is a doctor present at the state prison for men more often than there is a doctor present at the state prison for women. However, if you look at it on a per capita

basis the women get far more treatment than the men do" (Transcript of Hearing Before the Honorable Martin F. Loughlin, May 5, 1992, pages 20-21).

It is the state's contention that this issue is one of parity, and that female inmates have parity. Even the inmate's own attorney in the Fiandaca suit, while acknowledging that "the medical care is not great," contended that the State has provided medical care that is on parity with that of the men (Transcript of Hearing Before the Honorable Martin F. Loughlin, May 5, 1992:34). Yet, it has been shown that the majority of the inmates are overwhelmingly still dissatisfied with the medical care that is being afforded them (Franklin Pierce Law Center, 1993:21-22).

While it may be true that the legal action taken by the inmates sought relief in the form of parity, it is questionable whether this was really what they were seeking. Did the inmate plaintiffs want parity; or, were they seeking a forum for voicing complaints about their treatment and for asserting demands for better treatment?

Spector and Kitsuse (1977:83), in conceptualizing the claims-making activity that leads to the construction of social problems, note that "[C]laimants construct notions about the causes of the conditions they find onerous, assign blame, and locate officials responsible for rectifying the conditions." These "notions" that Spector and Kitsuse are referring to will influence the strategy adopted for constructing and presenting claims.

This paradigm can be applied to this examination of the creation of the women's prison. How can a small group of female inmates, scattered in different institutions, with limited access to correctional officials, make their grievance heard? Correctional policy requires that they conform to the rules and regulations of their host institutions. The

documentary evidence that is available does not indicate that female inmates used institutional grievance procedures to voice their claims. In fact, it suggests the opposite--that the women inmates were fairly silent and invisible within the correctional system. At least until Fiandaca v. Cunningham was filed. The Fiandaca lawsuit provided the inmates with a vehicle for attracting the State's attention. It also provided them with a vehicle for "claims-making activity" that defined their personal correctional problem as a broader social problem--that of gender discrimination.

One question that emerges is how the inmates came to see litigation as the solution to their problem? According to Spector and Kitsuse (1977:84), the claims-making activity that leads to the construction of social problems involves an interactional process which presupposes a possible solution. The claimant's definition of both the problem and the solution cannot be extricated from the system of professional agencies and agents that exist to receive and remediate the problem. Drawing from the observation of Everett C. Hughes, Spector and Kitsuse (1977:84) noted that problems are defined through interaction with others who are similarly situated as well as through interaction with professionals.

It is not possible to know whether the inmates interaction with correctional officials contributed to their decision to seek a legal forum for making their claims of inequitable treatment. There are many other possible factors that could have influenced this decision. One may have been the success of the Laaman litigation in bringing significant and comprehensive changes into the men's prison. Another may have been the general climate of women's rights and legal concern over women's issues that was

activated by the reemergence of the women's movement. Still, one factor could have been interaction with professionals or correctional officials that suggested or encouraged the use of litigation. In fact, there is reason to believe that this may have played some role in the inmate's decision.

As previously discussed, 6 days before the litigation was initiated, on June 14, 1983, the inmates who filed the original lawsuit sent a letter to Warden Perrin. They complained about their correctional treatment at the county facility and presented an itemized list of 'entitlements.' The response to this letter, which was directed to the jail superintendent and not to the women, and which rejected the validity of their complaints, was dated June 20. The lawsuit was filed on the same day.

It is possible that the letter was dated June 20 and received at the county facility on that day. However, it is highly unlikely that the women received notification of this letter, and then filed the lawsuit, all in the same day, without having had either prior knowledge of its content or a prior intent to litigate regardless of the warden's response. It seems apparant that the process of litigation had to have been initiated even before they knew that their complaints were not acknowledged and would not be ameliorated by the warden. They would have had to have consulted with an attorney to determine the viability of litigation prior to June 20 in order for the suit to have been filed on that date. Even the language of their letter, in the use of the term 'entitled' to identify their claims, suggests a prior intention toward litigation. Additionally, there is an excessiveness to



many of their demands<sup>14</sup> that is inconsistent with what their past experience might lead them to believe to be reasonable from an administrative standpoint. Furthermore, it is difficult to imagine that the inmates were consulting with an attorney without the knowledge of someone in the department of corrections. Therefore, it seems reasonable to speculate that the decision to litigate was made not only in the context of interaction with other inmates but also with either correctional officials, or legal professionals, or both.

It is also not known whether a legal option was the only one considered; or, whether other options, such as using the media to generate public awareness and support of their situation or seeking the advocacy of private organizations working for prison reform, were considered and rejected. However, once it was decided to litigate their situation, an equal protection challenge may have seemed, or been suggested, to offer the most efficacious legal strategy. As a result, receiving parity with men became the legal remedy afforded through litigation. If this were the case, therefore, the inmates' choices for a solution to the 'conditions' they found 'onerous' were framed within the parameters imposed by the decision to make their claims within a legal forum (Spector and Kitsuse, 1977:83; Epstein, 1988:99).

Based upon the inmates' responses to the interview items in the Needs Assessment and their evaluations of extant prison programs and services, it is reasonable to assume that what the inmates were, and still are, really seeking is an acknowledgement and

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<sup>14</sup>Demands for picnics and field trips outside of the jail and photographs for distribution to their families are not reasonable expectations for prison privileges (Correspondence from inmates to Warden Perrin, June 14, 1983).

recognition of their needs. That they articulated this in the legal language of 'parity' was very likely because that was the language available to them, and not necessarily because it accurately expressed the solution they sought to their correctional problems. The following example offers some support for this speculation. Susan Hughes, an inmate who was one of the core organizers of the lawsuit, explained her motivations in working to mobilize the resources needed to litigate. While she was waiting to testify at the trial, she saw 11 other inmates similarly waiting to testify, seated in the juror's box, looking like jurors. According to Hughes, "The irony of the alleged victims appearing to be jurors...[caused her to feel] suddenly empowered, almost vindicated...I always knew it was wrong for institutions to unfairly exercise their physical power over someone, like my father had done. I finally thought I saw an end to the injustice...It's a perverse system that sends people to prison and tells them to change, then puts them in cement boots so they can't" (Hohler, April 5, 1987).

The question of whether the inmates' perceived the post-Fiandaca conditions as being on parity with those at the men's prison was raised in a joint hearing convened before the Fiandaca trial judge, The Honorable Martin F. Loughlin (hereafter referred to as Joint Hearing). This hearing consisted of two attorney's from Wiggin and Nourin, the firm that replaced NHLA in representing the female inmates in Fiandaca; the State's attorney; a Department of Corrections representative; and two attorneys from the Disabilities Rights Center, Inc. (DRC) who were representing the disabled female inmates previously discussed. It was conducted to address additional motions before the Court surrounding attorneys' fees and as a status conference on conditions at the women's

prison, which the DRC brought to the Court's attention. At this meeting, the inmates' counsel contended that parity had been met, their firm's job was done, and it was time to issue the final order and have the court get out of the case. The DRC, based on what they learned from their work at the prison, questioned whether the female inmate "class" would agree with their attorney that the job was done and parity existed:

I don't think today's the time to get into a discussion as to exactly what parity means versus equality. There are obvious legal standards that need to be met...With respect to the class at large [female inmates]...does that class at large in fact favor the entry of the order terminating this case on the grounds that parity has, that there now is parity or does the class not...they are the clients and it's a matter for the class to decide. *Our sense is that there's a real question about that* (Joint Hearing, May 5, 1992:30-31; emphasis added).

Under federal mandate, the DRC is restricted to legal representation only of disabled persons. Thus, they were unable to represent the entire class of female inmates. However, the attorney's expressed concern that parity issues still existed at the women's prison that should be handled within the jurisdiction of Fiandaca rather than through separate subsequent litigation. They noted that the firm of Wiggin and Nourie wanted to be released from the Fiandaca case. They suggested that an independent counsel be appointed

to represent the class to determine whether or not currently, May of 1992, it is the view of the class that parity, equality, whatever the standard is, has been met and counsel who could satisfy himself or herself that there in fact is good and full reason now to terminate this matter...We believe based on our contact with four clients that there is good reason not to terminate this matter, yet we cannot overreach and claim to represent the class (Joint Hearing, May 5, 1992:32).

It is apparent from this recommendation, despite the contention of the State, and even of the inmates' own counsel, that questions still existed over whether the female

inmates defined their problem as having been solved through the creation of the prison. It also suggests that the meaning of parity, and the level of relief this standard provides, as it is defined by the Department of Corrections and the court, is not necessarily consistent with the inmates' definition of parity, or the level of relief they sought.

An attorney from Wiggin and Nourie rejected both the DRC's observation that a desire "to be free of this case," and the judge's interjection that "[T]hey'd like to get paid too" was the motivation for their motion to close the case. He said that the attorney who represented the inmates

reached the conclusion on behalf of the firm, on behalf of her class, that she has faithfully represented that at this point her job is done...What we're saying, your Honor, is not that we want to get paid and we want to get out. We're saying the job is done. It's time for a final order on this case. If a new action on behalf of four other individuals or three other individuals seems to be needed, it can be brought (Joint Hearing, May 5, 1992:33).

The issue of new litigation looms largely here. Not only would this be expensive and slow in addressing the inmates' complaints but there is also a question over whether legal counsel would be available to the inmates if future litigation was needed. Due to the conflict of interest problems that developed during the Fiandaca litigation, New Hampshire Legal Assistance (NHLA) seemed unwilling to be involved in litigation for the women's prison. The inmates' attorney referred to this issue as part of her rationale for closing this case:

I have a problem with the fact that the women are going to continue to be treated separately from the men by that state agency which is charged with providing legal services to people in need. Legal Services [NHLA] has had sort of a hands-off policy with respect to the women. Generally. And that's a problem, because my charge is to represent them on the equal protection issue, not on every single legal issue that comes up with them.

And I was finding more and more as much as I...recommend that they call Legal Services, Legal Services largely does have a hands-off position with respect to them. And I've spoken with some people there about that and have asked them to broaden their representation, and the feeling is that as long as this lawsuit is pending that that's not going to happen. Now they still haven't assured me that they will pick up the women once the lawsuit ceases, but that... would certainly be the ideal situation. Maybe the women could be added to the Laaman lawsuit (Joint Hearing, May 5, 1992:35-36).

The suggestion that NHLA might represent the female inmates if the Fiandaca case was closed was challenged by an attorney from DRC. She stated that she spoke with NHLA "about taking on the women's prison and they have adamantly refused based on their previous conflict problems" (Joint Hearing, May 5, 1992:37).

What this exchange indicates is that, in the midst of discussing the question of whether the female inmates agree with the State and their own counsel that there is parity and the Fiandaca case should be closed, a debate developed over future litigation. This suggests a recognition of unresolved issues over whether parity exists and over what issues are encompassed under the legal standard for parity.

The inmates' counsel drew a distinction between parity issues and other legal issues that could be litigated in the future. However, even the judge expressed uncertainty over where to draw the line regarding questions of parity. When asked by the State's attorney whether the complaints surrounding the medical services available for the disabled inmates represented by DRC was part of the Fiandaca case or a separate litigation the judge responded "I frankly don't know" (Joint Hearing, May 5, 1992:27).

The transcript from this hearing indicates that there was a high level of disagreement over whether the issue of parity was resolved, and whether the court should

retain jurisdiction over this case. This is an issue of critical importance if legal reform is to be effective. Retaining court jurisdiction would provide inmates with easier access to the courts for litigating future conditions at the prison. Closing the case is an acknowledgement that the correctional program for women has met the conditions and standard set by the court order. Further court intervention to remediate conditions at the prison would, therefore, necessitate new litigation.

The concern that was expressed suggesting that access to legal assistance in future litigation may be difficult was not addressed any further. The hearing concluded with a ruling releasing Wiggin and Nourie from the case:

They want out. I got them in the case and they did it as a favor to the Court I believe, and it was a financial sacrifice to that firm to come in here...All I can say is that perhaps Fiandaca is not on all fours with Laaman. And we know, we get five to 12 actions, and the state knows more than I do, a month filed by prisoners at the men's prison. So I don't think this is going to be part of the class action, I don't know. I think its a new action. And I'll give it priority on my calendar, but, but that doesn't mean to say that every time something emanates from the women's prison that it's going to get priority, because there would be no parity with the men" (Joint Hearing, May 5, 1992:37-38).

The State's attorney also agreed that the case should be closed. He stated "[inmates'] counsel has told you, has told the defendants, that what the state has done is to treat the women on parity with the men, and the state certainly argues that point also. I think the Fiandaca case is over" (Joint Hearing, May 5, 1992:39)

One of the DRC attorney's made a last argument for the court to retain jurisdiction over the case: "I believe it simply is not the case that the class has informed class counsel that this is parity...I do not think it is appropriate for class counsel to close the case out"

(Joint Hearing, May 5, 1992:39). The inmates' attorney replied:

It is my judgment based on conversations with some of the women inmates in the class and based on my personal observations of what is going on, my visits to that facility, my understanding of and evaluation of the complaints I have received, that in fact as far as parity with the men is concerned that basically it exists and that this case, it's time for this case to be over. *It's time for the women to be treated like every other prisoner at that facility. And I want to see the women treated like the men* (Joint Hearing, May 5, 1992:40-41; emphasis added).

In follow-up correspondence advising the DRC of his decision to close the

Fiandaca case, Judge Loughlin explained his position:

I would like to have you look at this case from my perspective. First of all the case has been on my docket since 1983. Secondly, it has been given the full stroke of the pump in that I conducted a hearing, made a ruling which was later appealed to the First Circuit. Thirdly, I do not intend to make this a life-time venture by retaining control over this case. Fourthly, I would like to close this case if there are any future problems, which I know there will be, separate cases should be filed in this court...Fifthly, this is similar to the Laaman v. Helgemoe case which Judge Bownes had jurisdiction over and by no stretch of the imagination was it thought that Judge Bownes would make a life-time career of the New Hampshire State Prison for Men (Correspondence Judge Martin F. Loughlin to Attorneys Boots and Smith, September 14, 1992).

The final order was issued on September 23, 1992.

Herbert (1985:1195-1196) has characterized parity as a loosely defined concept.

Its reliance on a standard of 'substantially equivalent' does not provide definitive guidelines for determining when parity does and does not exist. How is 'substantially equivalent' defined and measured? Are services and programs that the State or the Courts define as equivalent in substance defined as such by the inmates? The confusion over whether problems with medical services for disabled inmates are part of a parity issue, and, thus, encompassed by Fiandaca, or whether they constitute a separate legal action reveals how

elusive the concept of parity can be--even to legal professionals. Given this, it is reasonable to question whether the inmates really understood what legal relief based on parity would provide in solving their correctional problems. It is very likely that they expected "identity" of facilities and services. What they got was identical treatment when it came to the deficiencies of the prison system, e.g., they are treated the "same" as male inmates at the Health Services Center, and 'substantially equivalent' treatment when it came to actual programs, services, and facilities, e.g., they don't have a separate infirmary. This may be what Rafter (1989) meant when she observed that the modern women's prison provides the worst aspects of the custodial model without the beneficial conditions that characterized the women's reformatory

#### Conclusion

This chapter began with an examination of the penal treatment of female offenders in New Hampshire from colonial times to the present. Its purpose was to provide an historical context for understanding why New Hampshire did not provide in-state correctional facilities for female prisoners until it was legally compelled to do so.

Information on female prisoners is extremely limited. That which is available suggests that the treatment of women offenders was relatively equitable to that of men until the development of the state prison in the early nineteenth century at which time gender disparities began to emerge. Throughout all of the nineteenth and most of the twentieth centuries, women prisoners were housed in a separate section of the men's prison. In the late 1950's, they were transferred out of state or to county houses of correction. Due to the small number of female prisoners, out-of-state transfer was more



cost effective than establishing a separate women's prison (Concord Monitor, October 27, 1984). However, as a result of this policy, the confinement conditions of female prisoners were qualitatively different from and inferior to those of male prisoners (Mem. Order, 1987:13).

In 1983, a class action suit was filed in federal district court on behalf of all female state prisoners charging the State with gender discrimination in its correctional treatment of women. As a result of the court ruling in this case, Fiandaca v. Cunningham, New Hampshire established its first women's prison in 1989. Under legal mandate, this prison was ordered to provide services on parity with those provided to men. However, as discussed in Chapter III and in this chapter, parity is a loosely defined concept.

Correctional litigation by male inmates is usually based on 8th amendment protections against cruel and unusual punishment (Turner, 1979). The remedy is usually for the state to rectify the problem, occasionally requiring an explicit plan and maintaining jurisdiction to insure it is enacted (see Laaman Consent Decree). Correctional litigation filed by female inmates is usually based on an Equal Protection challenge charging gender inequities in programs, services, and/or facilities. Generally, the remedy in discrimination cases is to extend previously denied benefits to the excluded class (Glover v. Johnson, 1979:1079). When the Equal Protection Clause is applied to corrections, however, the standard of relief that has been developed through caselaw is parity of programs, facilities, and services (Barefield v. Leach (1974); Glover v. Johnson (1979)). As a result, in practice, this standard is defined in relation to the conditions existing for men. It is worth noting, for example, that male inmates have not used an equal protection challenge to

demand conditions substantively equivalent to those found in women's prisons.

A parity of treatment standard does not prevent the State from recognizing and developing programs that address valid gender differences and needs. In developing this standard, Glover distinguished between correctional treatment that is identical and that which is "equivalent in substance if not form." In the words of the Court:

The women inmates have a right to a range and quality of programming substantially equivalent to that offered the men...But additions to that program should be based on the interests and needs of the female inmates rather than short-sighted efforts to duplicate the programs offered at male institutions. While, in many cases, equal treatment may safely be achieved by requiring identical treatment, I do not believe that in this case, identical treatment is either wise or just (Glover v. Johnson, 1979:1087).

Therefore, correctional programs can and should be designed in accordance with the intended purpose of incarceration (Glover v. Johnson, 1979; see also Laaman, Opinion. Civ. Action No. 75-258). However, in its practical application, this chapter has shown that the use of a parity of treatment standard in New Hampshire has resulted in the creation of a woman's prison that more often reflects the characteristics and, hence, the needs of the male inmates than of female inmates.

The last half of this chapter examined the correctional needs and concerns of female prisoners in New Hampshire as identified in Fiandaca and as expressed in interviews with the inmates. These included the following: access to medical, health care, and mental health services; substance abuse treatment; legal assistance; vocational and educational programs that will enable them to become economically self-sufficient upon release; parenting issues and concerns for children; and visitation and contact opportunities for maintaining family ties (Franklin Pierce Law Center, 1993).

The legal reform that resulted from the *Fiandaca* lawsuit addressed some of these concerns. However, interviews with female inmates that asked about their satisfaction and dissatisfaction with extant services, suggests that there are issues and areas of concern that remain unresolved. According to both the State of New Hampshire and the attorney who represented the inmates in the lawsuit, the State was ordered to provide parity of services for female prisoners and it has done so (Joint Hearing, May 5, 1992). Yet, the inmates perceive the quantity and quality of prison programs as unsatisfactory in meeting their needs (Franklin Pierce Law Center, 1993). The discrepancy between the State's perception and definition of parity of programs and services and that of the inmates calls into question the adequacy of a parity standard, as it is being applied, in addressing the correctional needs of incarcerated women.

This discrepancy between legal theory and applied legal remedies also exemplifies the dilemma discussed in Chapter II of using legal strategies based on recognition of women's special needs versus demands for equality (Daly, 1990). Legal equality does not necessarily ensure that the immediate needs of female prisoners will be adequately identified or met. The use of an equality ethos to create a prison can prove counterproductive in that it legitimates the institutional model as an appropriate response to crime control for all categories of offenders.

Once created, prisons assume an independent existence. First and foremost, their purpose is to incapacitate offenders. As a result, security is their prime objective. Once this is achieved, other objectives, whether treatment, punishment, deterrence, or just deserts, can be pursued. How penal objectives are identified and the methods by which

they are accomplished will vary from one correctional system to another. However, once institutions are created, they become political actors in their own right. Institutional actors both reflect and embody goals that motivate action on behalf of the institution. They develop constituencies who have vested interests in their perpetuation and expansion (March and Olsen, 1983:742). Institutions provide a structured setting that influence communication and interaction and hence social existence (Epstein, 1988:100). As a result, they assume a meaning and social reality that becomes reified and objectified (Berger and Luckman, 1966). Since the meaning that they create is contextual, the definitions that emerge will vary in accordance with one's structural position. This means that the definitions of inmates' needs and the development of programming appropriate to those needs will be different for policy makers and inmates.

The objectives of the inmates in seeking the creation of a prison may have been, and probably were, considerably different from the objectives that will characterize its existence. It is questionable that the female inmates wanted a prison as opposed to recognition of and responsiveness to their needs. The fact that the prison now exists and they still perceive their needs as unmet is an indication that this may be true. A comparison of programs, facilities, and services offered at the men's and women's prison suggests that the creation of a prison through litigation does not necessarily address the needs that motivated the use of legal reform. At best, parity, as applied through correctional litigation, appears to have only provided partial relief in meeting the needs of incarcerated women in New Hampshire. As long as the definition, purpose, and operation of the prison is different for the keepers from those kept, parity will provide a

weak and unstable guideline for developing an appropriate and effective correctional program.

It is well recognized in the literature on women's prisons that due to small population size and the non-violent nature of female inmates, women's prisons have fewer resources allocated them and less attention and concern directed toward them (Arditi, et.al., 1973:1231-1244; Gibson, 1973:219-233; Glick and Neto, 1977:105; Fabian, 1980:177-178; U.S. Comptroller General Report, 1980:i-v; Champion, 1990:464-465).

New Hampshire is no exception to this. Differences in population size as well as budgetary allocations result in fewer and lower quality of programs and services available for women prisoners in comparison to men prisoners. It is unrealistic to expect a prison with a population of 100 to provide the same quantity and quality of services as one with a population of 1,479. In 1991, 6.4% of the correctional budget went toward the women's prison in comparison to 68% of the budget which supported the men's prison. In 1992, allocations for the women's prison dropped to 5.7% of the budget while allocations for the men's prison increased to 69.9, despite the fact that the female population increased by 28.5% and the male population only rose by 9% (Biennial Report, 1990-1992).

In the last decade, New Hampshire has spent in excess of \$61 million to expand its prison system. Its prison population has increased from 394 in 1982 to 1,553 in 1992. The cost of constructing the women's prison was \$1 million. The number of women under state sentence has more than doubled from 35 in 1989 when the prison opened to 74 in 1992. The question still remains as to whether this is the most appropriate and cost effective way to handle female crime. In an era of rising correctional populations,

increased expenditures for construction and renovation of prisons, and decreasing funds for programs and rehabilitation, it becomes even more critical to examine the efficacy of the institutional model in responding to crime. For example, despite the small portion of the correctional budget allocated to the women's prison, its per capita cost is greater. Due to the population discrepancy between the two prisons, the State pays \$10,000 more per inmate each year to confine women than to confine men (Biennial Report, 1990-1992).

Gusfield (1980:viii) has observed that "solutions to human problems often create new problems in solving initial ones." In the same vein, Spector and Kitsuse (1977:142) have asked, "When does the social problem cease to exist?" This question is particularly relevant to this research. Once the initial condition is addressed (i.e., gender inequities in correctional treatment), and the group identifying the problem is successful in achieving a solution (i.e., defining their personal hardship as a systemic problem in need of redress through creating a prison), does the problem cease to exist or do new problems emerge?

The relevancy of this question is exemplified by the debate between counsels for the inmates, the State, and the DRC over whether parity exists at the women's prison and whether the Fiandaca case should be closed. It is in the context of this debate that legal reform can be seen as having unintended consequences. Davis and Stasz (1990:61) have observed that social processes contain elements of both continuity and change. Conflict, resistance, and rebellious response to structural inequalities in the distribution of power and resources can lead to a "destructuring" of existing social patterns and mechanisms of social control. The response of control agents to this "destructuring" can lead to a "restructuring" of social patterns, institutions, and power relations. This observation is

important in studying the creation of the women's prison and the criminal processing of female offenders.

Female inmates used legal reform to present a correctional problem. The creation of a prison was the solution. From the inmates' perspective, the problem still exists. Now, however, the existence of the prison has created a bigger problem -- the expansion of the institutional model, once limited mainly to men, being more broadly applied to women.

It has been predicted (Singer, 1973:55; Daly, 1990; Chesney-Lind, 1992) that litigation that forces state government to construct more or bigger prisons will result in more extensive use of institutionalization for offenses that may have previously been handled in the community through less severe sanction. Now that an institution exists to receive female offenders, are the courts more likely to perceive them as needing institutionalization? Once a prison exists, are offenders who would have received non-institutional sentences more likely to be incarcerated?

The next chapter will explore the unintended consequences of parity and an equality ethos from a different perspective by examining the changes that have occurred in sentencing female felony offenders in one superior court district since the prison has come into existence. It will be shown that in addition to providing only a partial solution to the correctional needs of female inmates, legal reform based solely on parity may encourage further criminalization of women in the justice process.

## CHAPTER V

### THE CRIMINAL PROCESSING OF FEMALE FELONY OFFENDERS

#### Introduction

It has been predicted (Daly, 1990:8; Rafter, 1992a:202-203) that one of the unintended consequences of an equality ethos would be an expansion of women's prisons and the increased incarceration of women. However, no research has been found that empirically examines this relationship.

This dissertation has explored the use of an equality ethos as the basis for legal reform of women's corrections and in the creation of a women's prison in New Hampshire. Chapter IV focused on whether the use of litigation based on equal protection and a parity standard is sufficient for meeting the treatment needs of incarcerated women. This chapter extends this analysis further by exploring the unintended consequences of an equality ethos on the criminal processing of female felony offenders. Its purpose is to examine some of the ways in which an equality ethos can influence the processing of female offenders in the justice system and influence the likelihood of female incarceration.

This analysis is intended to explore changes in the processing patterns of female felony offenders prior to and following the existence of a women's prison. It does not purport to establish a causal relationship between the existence of a prison and the use of incarceration. The scope of this study is too limited to adequately control for the



numerous legal, political, social, and organizational variables that influence criminal justice decision-making and, thus, affect incarceration rates (see Chapter II). The results that are presented in this chapter are exploratory and descriptive. They are not intended to be generalizable to any other court district in New Hampshire or to any other state.

The questions this research seeks to answer are: (1) whether court referrals, prosecution, and commitments increased in the postprison period; (2) whether the length of commitment increased in the postprison period; and (3) whether the offenses which received incarcerative sentences decrease in severity in the postprison period.

#### Study Population and Methodology

The study population consists of all female felony cases referred to the Hillsborough County Superior Court for prosecution between January 1, 1986 and May 31, 1993. Offenders who reappeared on new charges during this period are treated as separate cases. Therefore, the unit of analysis is the case, not the offender. Cases are aggregated into dichotomous categories of before (preprison) and after (postprison) the opening of the prison. The postprison baseline begins with the date the prison opened, November 13, 1989, and ends on May 31, 1993, the last date for which data is available. The postprison period is 42 months and 18 days. The preprison period consists of all cases closed between January 1, 1986 and November 12, 1989. Due to the extremely small number of cases processed by the court prior to the prison's opening, the preprison period is slightly longer in order to develop a clearer pattern against which to measure change. The preprison period is 46 months and 12 days in duration.

These baselines provide a heuristic tool for examining patterns in the volume,

disposition, and sentencing of female felony cases. Dividing the time studied into pre and postprison periods enables the processing trends to be conceptualized in relation to the prison's existence. However, it is important to note that the demarcation between a time when the prison did and did not exist is not this definitive. While it is true that the prison opened on November 13, 1989, this date is only a legal reality. The social reality, which is more relevant to this study, is that the prison's influence existed prior to the date of its actual opening.

As discussed in Chapter IV, the litigation that led to the creation of the prison began in 1983, and the court order to build a prison was given in October of 1987. From the inception of the lawsuit to the opening of the prison there were negotiations, conflict, court appeals, and publicity. Police, prosecutors, and judges were aware for two years that a prison was being established, and they were aware that its projected opening was the fall of 1989. It would require a separate study to determine the conscious and nonconscious influence this knowledge exerted over the processing decisions of justice personnel during this period.

Furthermore, during the litigation process female felony offenders under state sentence continued to be housed at the Hillsborough County House of Correction, which was the facility that was converted into the women's prison. On the day the prison opened, therefore, most of its inmates were only transferred from one area of the building to another. Unlike studies that measure the impact of codes or legislation where there is a clear point of onset at which the change occurred, the influence of the prison would be expected to be more gradual and diffuse.

### Procedures and Limitations

The New Hampshire court system is organized by county and all felonies are processed at the superior court level, by the County Attorney's Office. Court statistics are available sporadically across a variety of reports and studies. For example, during its years of operation, the Statistical Analysis Center provided a rich source of statistics on crime and justice in New Hampshire, and the Judicial Council produced biennial reports for a period covering approximately a decade. Additionally, the State Superior Court Center maintains records dating back to 1975 on state prison sentences and on those for which a Sentence Review is requested. However, the limited scope of this database makes it unsuitable for a comparative analysis of overall sentencing patterns over time.

Court records are not centralized, and I was unable to locate a consistent source of court data that included the number of cases, by offense and/or offender characteristics, prosecuted and sentenced in New Hampshire. Therefore, an examination of changes in the court processing of female felony offenders necessitated a case-by-case search through individual court files at individual courthouses. As a result of fiscal and time restraints, it was necessary to limit data collection for this study to one superior court district.

Hillsborough County Superior Court was chosen for several reasons. It is the largest county by population, and it contains the two most heavily populated and urbanized cities in the state--Manchester and Nashua. Since it is a predominantly urban county, its population is the most heterogeneous. In 1990, 5.3% of Hillsborough County's population was foreign born. This was higher than in any other county and 1.6 % higher than that of the State as a whole (Census of Population and Housing, April, 1992:6).

Furthermore, the highest percentage of prison commitments are from this court. From 1988 to 1990, 35.7% of all prison commitment were from this court district, and by 1992 this had increased to 42% (Department of Corrections, Biennial Reports, 1988-1990 and 1990-1992).

Court records are not computerized but are physically stored in file folders. When a case is closed, the folder is numbered using an internal numbering system and stored in file cabinets and storage boxes in the basement of the courthouse. A cross-referenced listing of each case is maintained by offender name and case number. After 8 years, boxes are moved into a storage warehouse at another location. At the time the data for this study was being gathered, during the summer of 1993, the file boxes for 1985 were in the process of being moved and were not available for inclusion in this research.

File folders are not categorized by gender or offense. Only the offender's name and reference number are on the outside. Therefore, although the number of female cases is small, the method of record-keeping necessitated searching every file processed by the court for the study period. Approximately 2,000 cases are processed annually. Data on female offenders was gathered by manually searching every file for those with a known female name, a name used by males and females, or a name of unknown gender. Those files were then examined for police reports that would definitively identify gender. Approximately 15,000 files were screened. Every effort was made to be thorough in locating the files of women, but a file of a woman with a traditionally male name would have been excluded.

Once obtained, each file was read to obtain data on each offender. This included:

court identification number; name; arrest date; police department where arrested; offense(s) charged at arrest; court docket number; offense(s) charged by court; offense(s) dismissed, transferred to another jurisdiction, not indicted by grand jury, or not prosecuted (not prosecuted); plea entered; disposition; sentencing date; sentence.

The primary variables used in this analysis are: offense, prosecution, sentence date, disposition, and type and length of sentence. Offense is summarized into 14 categories: violent, drug trafficking, drug possession, theft/fraud, welfare fraud, other property, prostitution/morals, motor vehicle, felonious sexual assault, child endangerment, weapons, probation/parole violations, escape, and miscellaneous other. The specific offenses that comprise each category are listed in Appendix A.

Prosecution is summarized into 8 categories: prosecuted as charged; reduced to misdemeanor; reduced in counts; not prosecuted (not prosecuted); reduced to lesser felony; escalated to felony; dismissed; and reduced both in counts and to a misdemeanor.

Sentence date is used to create a dichotomous time period variable of preprison and postprison.

Disposition refers to the outcome of a case after prosecutorial screening. This variable consists of 6 levels: dismiss; not prosecuted; failure of grand jury to indict; not guilty; continued without a finding; and sentenced.

Sentence consists of 6 types: house of correction--suspended or deferred; state prison--suspended or deferred; house of correction--committed; state prison--committed; residential treatment; and non-institutional (fine, restitution, probation, community service, non-residential community treatment).

Length of sentence is defined as the minimum and maximum amount of time that is committed. Suspended sentences are not included unless a portion of the sentence is to be served. In that case, it is handled as a committed sentence and the amount of the sentence to be served is coded in months.

Data was obtained on 762 cases. Files that did not contain a disposition or a sentence were excluded from analysis. Shrinkage due to incomplete files was 3.4%, leaving a total number of 736 cases. Each case was coded for analysis using SPSS for Windows. It is not unusual for a case to have multiple offenses and multiple sentences. Because of the complexity of court data, and in an effort to extrapolate the data that was the most relevant to this study, i.e., patterns in the use of incarcerative sentences, it was necessary to reduce multiple offenses and sentences to one offense and one sentence for each case. Offenses and sentences were reduced on the basis of sentence severity.

The rationale for using sentence severity as the basis for data analysis rather than offense severity was derived from qualitative assessment of how cases were sentenced. Initially, I intended to use the penal code to determine which offense was the most serious and use offense severity as the basis for coding the sentence. However, after collecting and collating the data, I observed that offense severity did not always correspond with sentence severity. For example, an offender charged with possessing and selling drugs might be sentenced on the possession charge with the sentence for the sale of drugs charge suspended. I found this to be logically confusing since sale of drugs is a more serious offense than possession. Furthermore, cases involving multiple offenses were often sentenced so that the first sentence served as the basis for all subsequent sentencing, even

if that sentence was for a different or lesser offense. For example, if one count of forgery was sentenced at two to four years incarceration, the sentencing on all other offenses, was given in relation to the first sentence--to be served either concurrently or consecutively to the initial sentence.

Kruttschnitt (1992:92) has observed, that the legal system responds to different forms of conduct in the same way which often makes "legal labels" a poor indicator of offense severity. Many factors influence sentencing so that the offense itself is often less important than offender characteristics, the sentencing objectives of the judge, or negotiations that are arranged between prosecutors and defense attorneys. As a result, judges will often rely upon both legal and extra-legal criteria in determining the appropriate sentence, which is then used as the basis for subsequent sentences. This appeared to be a logical explanation for why offense severity was not a valid indicator of sentence severity in this dataset. Since one of the purposes of this research is to examine changes in sentencing, the severity of the sentence rather than the offense is used as the basis for coding each offense.

Individual case histories are aggregated by time period to determine changes in referrals and screening of cases for prosecution, sentencing patterns regarding the frequency of commitments for all offenses, the frequency of commitments by type of offense, and the severity of sentence as measured by the length of incarcerative sentences.

### Findings

Each case referred to court for prosecution by the police is screened to determine

whether it should be accepted or dismissed. A prosecutor has broad discretionary power in screening cases for prosecution. A case may be dismissed at any time by the prosecution. Additionally, a case may be initially accepted but later rejected if a successful prosecution appears unlikely. This process is referred to as *nolle prosequi* or *nol pros* (Inciardi, 1993:352-353). Tables 14 through 17 examine changes in prosecutorial screening and case disposition between periods. Tables 18 through 22 examine changes in sentencing patterns.

Case Referral for Prosecution by Offense Category. Table 14 presents the percentage of cases referred by police for prosecution by offense category and time period. The most notable change revealed is the large increase in the number of court referrals between periods. Court referrals increase by 161%, from 204 cases in the preprison period to 532 cases in the postprison period. The most common offense for which female felony cases are referred for prosecution in both periods is theft. This is consistent with female offense behavior revealed in national arrest statistics, as presented in Chapter II (see Table 5).

For the entire study period, slightly over half of all female felony court referrals (56.5%) are for property crimes. A little more than one-third (34.9%) of court referrals are for theft, and 20% are for welfare fraud. Very few offenders (2.4%) are referred for other types of property crime such as criminal trespass or malicious damage to property.

The other major offense category is drug offenses, which accounts for slightly over one-quarter (26.8%) of all case referrals. Drug referrals are fairly evenly distributed between drug trafficking and drug possession charges. A very small number of referrals



Table 14. Percent Distribution of Cases Referred for Prosecution, By Offense Category and Period

Offense Category*	Total Study Period		Preprison		Postprison		% Difference Between Periods
	%	f	%	f	%	f	
<b>Violent</b>	<b>3.5</b>	26	<b>5.4</b>	11	<b>2.8</b>	15	<b>-2.6</b>
<b>Drug</b>	<b>26.8</b>	197	<b>26.4</b>	54	<b>26.9</b>	143	<b>+0.5</b>
Trafficking	13.3	98	13.7	28	13.2	70	-0.5
Possession	13.5	99	12.7	26	13.7	73	+1.0
<b>Property</b>	<b>56.5</b>	416	<b>57.3</b>	117	<b>56.3</b>	299	<b>-1.0</b>
Theft	34.9	257	38.7	79	33.5	178	-5.2
Welfare Fraud	19.2	141	15.2	31	20.7	110	+5.5
Other Property*	2.4	18	3.4	7	2.1	11	-1.3
<b>Other</b>	<b>13.0</b>	96	<b>10.8</b>	22	<b>14.1</b>	75	<b>+3.3</b>
Motor Vehicle	3.5	26	2.5	5	3.9	21	+1.4
Child Endangerment	1.9	14	2.9	6	1.5	8	-1.4
Probation/Parole Violation	3.4	25	1	2	4.3	23	+3.3
Escape	1.2	9	0.5	1	1.5	8	+1.0
Felonious Sexual Assault	0.5	4	0.5	1	0.6	3	+0.1
Prostitution	0.5	4	-	-	0.8	4	-
Miscellaneous Other*	2	15	3.4	7	1.5	8	-1.9
Totals**/Percent Change Between Periods	99.8	736	99.9	204	100	532	+161%

\*Crimes that comprise each category are listed in Appendix B.

\*\* Cells do not equal 100 due to rounding.

(26) are for violent crime. This offense category accounts for only 3.5% of all court referrals.

**Property Crime.** Referrals for property crime remain fairly stable between periods, decreasing by only 1% in the postprison period. This is primarily due to a 5.2% decrease in referrals for theft and a 1.3% decrease in other property crimes. On the other hand, the percentage of welfare fraud referrals increase by 5.5% in the postprison period, offsetting

most of the drop in theft and other property crime referrals.

Drugs. Much of the increase in court processing and incarceration for both males and females nationally and in New Hampshire has been attributed to an increase in arrest and prosecution for drug offenses (State of New Hampshire Prison Expansion, April 1992:26). However, this is not supported by the data presented in Table 14. It can be seen that the percent distribution of referrals for drug offenses remains fairly stable for both periods, increasing only a fraction of a percent in the postprison period. Referrals for drug trafficking (which includes the sale, manufacture, and transporting of drugs) stay at approximately 13% of the overall offense distribution for both periods. In contrast, referrals for drug possession increase by one percentage point. As a result of this increase, cases involving drug possession are referred as frequently as drug trafficking cases in the postprison period. This suggests that increased drug referrals may be more reflective of a wider law enforcement net regarding arrests and referrals for drug possession than of an increase in more serious drug-related criminal behavior engaged in by women.

Referrals for drug offenses and property crime combined account for over 80% of court referrals across both time periods, and for the study period as a whole.

Violent Crime. The number of women referred for prosecution for violent crime is extremely small for both periods. There are only 26 cases for the entire study period, 11 in the preprison period and 15 in the postprison period. This decline reflects a 2.6% decrease in referrals for violent crime in the postprison period. Therefore, the overall increase in court referrals in the postprison period is not explained by an increase in violent behavior by female offenders.

Other. This category consists of a variety of offenses as listed in Table 14. Listed under Other is a 'Miscellaneous Other' category. This includes offenses like perjury, filing false reports, providing false information, and witness tampering which occur infrequently yet are too numerous to list separately.

As can be seen, most of the offenses listed under Other are relatively non-serious. The most serious are child endangerment and felonious sexual assault. However, there are only 18 cases involving these crimes for the entire study period, which jointly constitute only 3.5% of court referrals. There is a 3.3% increase in court referrals for Other offenses in the postprison period.

The first question this research addresses is whether there is an increase in court referrals of female felony offenders in the period following the opening of the women's prison. The results, presented in Table 14, reveal that total referrals increase by 161% between periods. Most of this is explained by an increase in court referrals for welfare fraud, probation and parole violations, escapes, and motor vehicle violations. Not only are these crimes that are traditionally associated with women (Steffensmeier, 1978; Giordano, 1981; Feinman, 1986), but they are also less serious offenses than would be expected if increased court processing of female offenders was in response to more serious female crime.

The offenses included under Other comprises 10.8% of referrals in the preprison period and 14.1% of postprison referrals. This suggests that much of the increase in criminal processing of women may be due to a wider net in selecting cases for court referral.

Table 15. Percent and Frequency of Cases Rejected and Prosecuted, By Period

Period	Total Distribution		Percent Rejected		Percent Prosecuted	
	%	f	%	f	%	f
Preprison	27.7	204	36.7	75	63.3	129
Postprison	72.3	532	21.5	115	78.4	417
% Difference	100	736	-15.2	190	+15.1	546

Prosecutorial Screening, Preprison and Postprison. In addition to changes in court referrals, this study also asks whether prosecution increases following the opening of the women's prison. An increase in the volume of cases accepted for prosecution after screening is expected if the processing of female felony offenders through the justice system is more rigorous in the postprison period. Table 15 presents the percentage of cases referred for prosecution that are rejected and prosecuted for each period. Cases are rejected through dismissal or nol pros.

In the preprison period, slightly less than two-thirds of cases referred to the County Attorney's Office are prosecuted (63.3%). In contrast, slightly over three-fourths (78.4%) of cases are prosecuted in the postprison period--an increase of 15.1%. There is a 15.2% decrease in cases rejected for prosecution. Rejected cases drop from 36.7% in the preprison period to 21.5% postprison. Thus, prosecution increases in the postprison period.

Reduced Charges. Prosecutors may accept a case for prosecution but reduce the number of charges (referred to as counts), reduce the charge itself to a lesser punishable

Table 16. Percentage of Cases Prosecuted as Charged, Reduced, Nol Prossed, or Dismissed, By Period

Disposition	Period					
	Total	Preprison		Postprison		%
	%	%	f	%	f	Difference
Prosecuted as Charged	56.9	46.6	95	60.9	324	+14.3
Reduced Charges	17.7	19.2	39	17.1	91	-2.1
to misdemeanor	12.0	15.2	31	10.7	57	-4.5
to lesser felony	1.2	2.5	5	0.8	4	-1.7
in counts	4.5	1.5	3	5.6	30	+4.1
Nol Prossed	9.1	11.3	23	8.3	44	-3.0
Dismissed	14.3	21.1	43	11.7	62	-9.4

felony or a misdemeanor, or prosecute the case as originally charged. Table 16 provides a more detailed explanation of how cases are disposed at prosecution. As can be seen, slightly less than half (46.6%) of referred cases are prosecuted as charged in the preprison period. However, in the postprison period, 60.9% of cases are prosecuted as charged--an increase of 14.3%. There is a corresponding decrease of 12.4% in the volume of cases dismissed and nol prossed in the postprison period. Also, cases are less often reduced to misdemeanors or lesser felonies (-4.5% and -1.7%, respectively). This pattern is not consistent, however, with cases reduced in counts. There is a 4.1% increase in this disposition category.

Every offense incident is treated as a separate count. For example, an offender who forges a signature to 10 checks would be charged with 10 counts of forgery. Since additional counts increase the severity of the punishment, prosecutors can use reducing the counts as part of the plea negotiation. Therefore, the increased practice of lowering the

counts rather than reducing the entire charge to a misdemeanor may, in itself, be reflective of less leniency in prosecutorial discretion.

In the preprison period, prosecutors reduced the charges in almost one-fifth of all cases screened. Nearly 18% of these reductions were to misdemeanors or lesser felonies. In the postprison period, however, the percentage of cases reduced in charges is fewer. Furthermore, reducing the counts explains a higher percentage of reduced charges in the postprison period than in the preprison period.

Prosecutors also have the discretion to escalate a misdemeanor to a felony. This category is not shown in this table because in each period there was only one case where this occurred. Given the higher number of cases referred in the postprison period, it may be that cases are slightly more often escalated to felonies in the postprison period. However, the number of cases in which prosecutors exercise this option is too small to warrant drawing conclusions.

The results reported in Table 16 suggest that cases are more often prosecuted as charged, and less often dismissed, nol prossed, or reduced to either misdemeanors or lesser felonies in the postprison period.

Table 17 provides a closer examination of prosecutorial screening. It presents the disposition of cases by major offense categories for each period. For each offense category, except welfare fraud, the percentage of cases prosecuted as charged increases in the postprison period. The percentage of cases rejected for prosecution, through the combined use of dismissal and nol pros, between periods decreases for every crime category except violent crime. Additionally, the percentage of cases reduced in severity

Table 17. Frequency and Percent of Cases Disposed by Prosecutor, By Major Offense Category

Offense	Preprison Dispositions (N=54)				Postprison Dispositions (N=143)			
	Prosecuted As Charged %	Dismiss %	Nol Pros %	Reduced in Severity* %	Prosecuted As Charged %	Dismiss %	Nol Pros %	Reduced in Severity* %
Violent	27.3 (3)	36.4 (4)	18.2 (2)	18.2 (2)	33.3 (5)	40 (6)	20 (3)	6.7 (1)
Drug Trafficking	71.4 (20)	14.3 (4)	10.7 (3)	3.6 (1)	75.5 (53)	4.3 (3)	7.1 (5)	12.9 (9)
Drug Possession	34.6 (9)	23.1 (6)	15.4 (4)	26.8 (7)	49.3 (36)	16.4 (12)	13.7 (10)	20.5 (15)
Theft	43 (34)	21.5 (17)	11.4 (9)	22.8 (18)	57.3 (102)	12.9 (23)	7.9 (14)	21.8 (39)
Welfare Fraud	74.2 (23)	6.5 (2)	3.2 (1)	16.2 (5)	69.1 (76)	3.6 (4)	5.5 (6)	21.8 (24)

\*Reduced to misdemeanor or lesser felony.

decreases in the postprison period for every offense category except drug trafficking and welfare fraud .

As a result of these inconsistencies, it may be helpful to simplify Table 17 before discussing the meaning of the disposition decisions for each offense. Diagram 1 provides a more graphic description of how cases are screened by offense.

Diagram 1. Postprison Disposition By Offense Category

Offense	Full		Reduced	
	Prosecution	Rejected	Prosecution	
Violent	+	+	-	
Drug Trafficking	+	-	+	
Drug Possession	+	-	-	
Theft	+	-	-	
Welfare Fraud	-	-	+	

Violent Crime. For both periods, cases involving violent crime are more often dismissed or nol prossed than prosecuted as charged. However, in the postprison period, these cases are prosecuted as charged more often than in the preprison period. They are also more often rejected for prosecution in the postprison period (i.e., 6 out of 11 cases in comparison to 9 out of 15 cases). This may appear to be a contradiction, but with numbers as small as these, any changes will look meaningful. One explanation for why both prosecution and rejection of these cases increased may be found in the decrease in violent offenses reduced in severity in this period.

There were 2 cases of violent crime reduced in severity in the preprison period and only 1 case reduced in the postprison period. These numbers are too small to draw any conclusions regarding changes in processing practices between periods. However, they may be indicative of a shift toward less plea negotiation surrounding violent crime in the postprison period. More data is needed in order to determine whether prosecutors are less likely to negotiate violent crimes down to lesser offenses.

Keeping the small number of cases in this crime category in mind, violent offenses are more often prosecuted as charged in the postprison period. Overall prosecution, however, is lower because of an increase in cases dismissed and nol prossed in the postprison period.

Drug Offenses. For both periods, drug offense cases are more often prosecuted as charged than rejected or reduced in severity. Prosecution of drug cases as charged increases 8.5%. Overall prosecution, which includes prosecution at reduced charge severity, increases 10.5% in the preprison period. When drug cases are differentiated by



trafficking versus possession charges, differences in dispositions emerge in both periods.

Preprison, drug trafficking cases are prosecuted as charged almost three times more often (71.4%) than they are rejected for prosecution (25%), and charges are rarely reduced (3.6%). On the other hand, drug possession cases are slightly more often *rejected* (38.5%) than they are prosecuted as charged (34.6%). Similarly, drug possession charges are more often reduced in severity (26.8%) as well. Thus, cases involving possession are more likely to be dismissed, not prosecuted, or reduced in severity in comparison to cases involving drug trafficking in the preprison period.

In the postprison period, prosecution as charged for all drug offenses increases by 8.5%. Additionally, there is less discrepancy in processing drug trafficking in comparison to drug possession cases. Drug possession cases are still more often rejected for prosecution (30.1%) than are trafficking cases (11.4%). However, both types of drug cases are more often prosecuted as charged than dismissed and not prosecuted. The percentage of drug trafficking cases that are reduced in severity increases from 3.6% to 12.9% between periods, while the percentage of possession cases reduced in severity decreases from 26.8% to 20.5%. This suggests that plea negotiations may be being used more often in drug trafficking cases and less often in drug possession cases in the postprison period.

It appears that prosecutors are more likely to negotiate drug trafficking charges down to a lesser offense or in counts in the postprison period than in the preprison period. Conversely, the decrease in prosecution at reduced charges for drug possession suggests that prosecutors may be less willing in the postprison period to negotiate possession

charges down.

In terms of total drug prosecutions, drug cases are more likely to be reduced in severity and less likely to be rejected in the postprison period. As a result, overall prosecution (i.e., prosecution on reduced charges and as charged) of drug offenses increases by 10.5% between periods. Prosecution as charged on drug trafficking increases by 4.1%, while overall prosecution increases by 13.4%. Prosecution as charged on possession increases by 14.7%, while overall prosecution increases by 8.4%.

Theft. For both periods, cases involving theft are prosecuted as charged more often than they are dismissed or nol prossed. In the postprison period, the percentage of cases prosecuted as charged increases by 14.3%. Similarly, there is a 12.1% decrease in the percentage of cases rejected. The percentage of cases reduced in offense severity also decreases slightly from 22.8% to 21.8% in the postprison period. This decrease, combined with decreases in dismissals and nol prossed cases, suggests that theft cases are less likely to be reduced through plea negotiations in the postprison period and more likely to be prosecuted as charged.

Full prosecution for theft increases by 14.3% in the postprison period. Furthermore, cases are more often reduced in severity as opposed to being altogether rejected for prosecution. Thus, overall prosecution for theft increases by 13.3% postprison.

Welfare Fraud. For both periods, welfare fraud cases are more often prosecuted as charged rather than rejected or reduced in severity. This may reflect the highly specialized nature of this crime category. Also, welfare cases involve an additional party being

brought into the screening process--the Department of Welfare. These cases are usually referred by the police but there is a special investigation conducted by the Welfare Department that includes recommendations for prosecution and sentencing. This additional intervention, and the additional evidence that the second investigation provides which strengthens the prosecutor's case, may explain the high percentage of cases involving welfare fraud that are prosecuted as charged.

The category of welfare fraud has the highest percentage of cases prosecuted as charged and the lowest percentage rejected of all other offense categories for both periods. However, the percentage of cases prosecuted as charged decreases by 5.1% in the postprison period. The percentage of cases rejected for prosecution remains relatively stable between periods (9.7% to 9.1%). On the other hand, there is a 5.6% increase in the percentage of cases reduced in severity (from 16.2% to 21.8%).

Although the total percentage of cases rejected for prosecution remains fairly stable between periods, there is, nonetheless, a shift in the manner in which welfare fraud cases are screened out of the system. In the preprison period, 3 welfare fraud cases, out of a total of 31, are rejected for prosecution. Two are dismissed and one is nol prossed. In the postprison period, 10 welfare fraud cases out of 110 are rejected--4 are dismissed and 6 are nol prossed. Proportionately, more cases are dismissed than nol prossed in the preprison period. This reverses in the postprison period. This may seem unimportant, but if considered in the context of how cases are rejected, and in light of the increased percentage of cases reduced in severity in the postprison period, it is indicative of a possible change in the way welfare fraud cases are disposed.

Dismissals occur when cases are initially received. On the other hand, cases that are not processed are rejected at a later point, after the process of prosecution has begun. Therefore, cases that are not processed are subjected to more intense screening than cases that are dismissed. The percentage of cases reduced in severity increases by 5.6% which, in conjunction with an increase in the percentage of cases not processed (from 3.2% to 5.5% between periods), suggests increased plea negotiations for this offense. This may reflect the increased volume of welfare fraud cases between periods which rose from 31 to 110 cases in the postprison period--more than a three-fold increase. However, it is possible that as the volume of cases referred to court rises, the level of negotiation that occurs in order to dispose of cases expediently also rises. Lengthier prosecution as a result of higher welfare fraud caseloads does not benefit either the county attorney's office or the welfare department, which may make both agencies more receptive to negotiating a settlement.

Full prosecution for welfare fraud decreases by 5.1% in the postprison period. Overall prosecution, however, remains fairly stable between periods, increasing only a fraction of a percent from 90.4% of welfare fraud cases being prosecuted preprison to 90.9% being prosecuted postprison.

Sentencing Patterns Preprison and Postprison. Once a case is accepted for prosecution, plea negotiations begin. Fewer than 10% of cases processed by courts nationwide go to trial (Inciardi, 1993:355). This court is no exception in its high use of plea bargaining. For the entire study period, 99% of all female felony cases sentenced are part of a plea negotiation. Tables 18, 19, and 20 examine the sentencing patterns of

Table 18. Frequency and Percentage of Cases Sentenced to Commitment and Other Sentence Categories, By Period

Sentence	Period				
	Preprison		Postprison		% Difference Between Periods
	%	f	%	f	
<b>Commitment</b>	<b>22.9</b>	29	<b>33.9</b>	139	<b>+11.0</b>
State Prison	7.9	10	11.5	47	+3.6
House of Correction	15.0	19	22.4	92	+7.4
<b>Suspended</b>	<b>69.3</b>	88	<b>61.0</b>	250	<b>-8.3</b>
State Prison	16.5	21	14.4	59	-2.1
House of Correction	52.8	67	46.6	191	-6.2
<b>Residential Treatment</b>	--	--	<b>0.2</b>	1	--
<b>Non-Institutional</b>	<b>7.9</b>	10	<b>4.9</b>	20	<b>-3.0</b>

female felony cases for preprison and postprison periods. It is important to remember that house of correction commitments are served at the same facility as commitments to the state prison. For this reason, house of correction commitments are included in the analysis of sentencing patterns.

Table 18 presents the percentage of cases sentenced to commitment in comparison to other types of sentence for both periods. Suspended sentences are the most common type of sentence used for both periods, often given in conjunction with probation or some other type of non-institutional sentence. The percentage of suspended sentences decreases by 8.3% in the postprison period while commitments increased by 11.0%.

One of the questions asked in this research is whether the use of incarcerative sentences increases in the period following the prison's opening. As Table 18 reveals, 29 out of 127 cases sentenced in the preprison period are committed. This represents slightly

over one-fifth (22.9%) of all sentences for that period. Commitments rise to 139 out of 410 sentences, or approximately one-third (33.9%), of all sentences in the postprison period.

Commitments to the state prison increase from 10 out of 127 cases (7.9%) in the preprison period to 47 out of 410 cases (11.5%) postprison, a difference of 3.6%. House of Correction commitments increase even more, by 7.4%--rising from 19 out of 127 cases sentenced (15%) in the preprison period to 92 out of 410 cases sentenced (22.4%) postprison.

Non-institutional sentences (e.g., community treatment, community service, fine, restitution, or probation) are rarely used unless in conjunction with a suspended sentence. In these instances, the most common sentence is probation combined with a fine or restitution. In the preprison period, only 7.9% of all types of sentences are strictly non-institutional without being linked to some form of suspended or deferred sentence.

The use of non-institutional sentences decreases further in the postprison period. These sentences comprise only 4.9% of all sentences in the postprison period, a 3.0% decline in use. Also, residential treatment in a privately-run treatment facility is not ordered in any of the preprison cases and in only one case in the postprison period.

Although nearly two-thirds of all sentences are suspended in the postprison period, the use of commitment is clearly increasing. Furthermore, judges appear to be less inclined to use alternative forms of non-institutional sentencing unless used in addition to a suspended sentence.

Table 19. Frequency and Percentage of Commitments and Other Sentence Categories, By Period

Offense	Preprison Period						Postprison Period					
	N=127						N=410					
	% Committed		% Suspended		% Non-Institutional		% Committed		% Suspended		% Non-Institutional	
	%	f	%	f	%	f	%	f	%	f	%	f
Violent	40.0	2	60.0	3	--	--	40.0	2	40.0	2	20.0	1
Drug Trafficking	47.6	10	47.6	10	4.8	1	61.0	37	37.8	23	1.6	1
Drug Possession	38.5	5	53.9	7	7.7	1	46.0	22	52.1	25	2.1	1
Theft	12.8	6	72.3	34	15.0	7	22.0	30	70.3	97	8.0	11
Welfare Fraud	3.6	1	96.4	27	--	--	9.3	9	84.6	82	6.2	6

As previously stated, much of the increase in incarceration that is occurring nationally and in New Hampshire is often attributed to increased arrests and sentencing for drugs, as well as an over-all attitude toward the use of more stringent criminal sanction (Summary, State of New Hampshire Prison Expansion, Performance Audit Report, April, 1992:2). A closer examination of sentencing patterns is provided in Table 19, which presents the percentages of sentences that are committed, suspended, or non-institutional for each major offense category and other offenses. Offense categories are violent crime (murder, assault, robbery), drug offenses, theft (larceny, shoplifting, fraud, embezzlement), welfare fraud, and Other for both periods. Welfare theft is treated as a separate offense category because a high number of thefts are welfare fraud (141 for entire period, see Table 14), and this offense seems to present a separate pattern of sentencing from the more general category of theft. Other is a miscellaneous category that includes property

offenses like trespassing or destruction of property, motor vehicle violations, child endangerment, weapons, prostitution, felonious sexual assault, escape, witness tampering, and perjury. A complete listing is provided in Appendix B.

Sentencing for Violent Crime. The percentage of violent crime sentences that result in commitment is unchanged between periods (40%). Since the number of cases involving violent crime is so small, it is, once again, more meaningful to use numbers rather than percentages in discussing this category. Although court referrals for violent crime decrease by 2.6% in the postprison period (see Table 14), sentencing of this offense category remains surprising stable. Despite rising caseloads, for both periods only five cases sentenced involve violent crimes, two of which are sentenced to commitment. Violent offenses receive a suspended sentence slightly more often in the preprison period (three out of five) than in the postprison period (two out of five). The only change that occurs in the pattern of sentencing violent crimes in the postprison period is that one less case is suspended, and one case is given a non-institutional sentence. None of the preprison cases for this offense receive a non-institutional sentence.

Sentencing for Drug Offenses. In the preprison period, drug-trafficking sentences are suspended as often as they are committed (47.6%). This pattern changes in the postprison period, with sentences for drug trafficking being committed (60.7%) more often than suspended (37.8%). As a result, the percentage of sentences for drug trafficking resulting in commitment increases by 13.1%, while the use of suspended sentences decreases by 9.8% in the postprison period. Thus, sentencing for drug trafficking is more rigorous.



Sentences for drug possession, on the other hand, are more often suspended than committed for both periods. However, the difference in the percentage of possession cases that receive a suspended rather than a committed sentence is smaller in the postprison period. In the preprison period, 7 out of 13 (53.9%) drug possession cases are suspended and 5 are committed (38.5%). Postprison, 22 out of 48 possession cases, a little over half (52.1%), are suspended and 25 are committed (45.9%). The result is a 7.4% increase in commitments for drug possession and a 1.8% decrease in suspended sentences in the postprison period.

In both periods, only two drug cases receive non-institutional sentence. Despite the increase in drug offenses sentenced between periods, there is no corresponding increase in the number of non-institutional sentences.

These findings reveal an increase in the use of commitment in sentencing all drug offenses, and a decrease in the use of suspended sentences in the postprison period. Also, the use of non-institutional sentences for all drug offenses is proportionately lower in the postprison period, although the number of cases remains the same. For both periods there are more cases of drug trafficking than drug possession sentenced. However, the rate of increase in the number of cases of drug possession sentenced in the postprison period is slightly higher (3.5 times greater) than than of drug trafficking (3 times greater).

Sentencing for Theft. Sentences for theft also result in commitment more often in the postprison period (30 out of 138 cases, or 21.7%) than in the preprison period (6 out of 47 cases or 12.8%). Suspended sentences for theft decrease slightly from 72.3% (34 out of 47) to 70.3% (97 out of 138) between time periods. Additionally, the use of non-

institutional sentences decreases from 7 out of 47 (14.9%) in the preprison period to 11 out of 138 (8.0%) in the post-prison period. It is also notable that the volume of sentences for theft increases from 47 to 138 between periods.

Sentencing for Welfare Fraud. Commitment is rarely used for cases involving welfare fraud. More commonly, this offense receives a suspended sentence, a fine, and restitution. However, the use of commitment for welfare fraud increases from 1 case out of 28 (3.6%) in the preprison period to 9 cases out of 97 (9.3%) in the postprison period. In the preprison period, 27 out of 28 case of welfare fraud (96.4%) result in a suspended sentence, but this decreases to 21 out of 61 cases (84.6%) in the postprison period.

An additional change is noticeable in the use of non-institutional sentences. In the pre-prison period, non-institutional sentencing is not used at all, and almost all sentences are suspended. However, postprison, 11 sentences (6.2%) for welfare fraud receive a non-institutional sentence. The use of non-institutional sentences, combined with an increased use of commitment, explains the reduction in the use of suspended sentences for this offense.

Since welfare fraud is one of the more commonly committed female offenses, the increased use of commitment for this offense provides some support for concerns expressed in the literature that women are being processed more frequently and more severely for crimes that previously would have received probation or restitution (Feinman, 1986:26; Rafter, 1992a:254). The volume of sentences given for welfare fraud increases three-and-a-half times between periods.

Sentences for Other Offenses. The general category of other shows the greatest

increase in the volume of cases sentenced in comparison to any other offense categories. The offenses that comprise this category are predominantly minor offenses, with the exception of child endangerment and felonious sexual assault. Since these offenses are more serious than the others included in this category, the decision to include them as Other rather than as violent crimes requires some discussion.

There is only 1 case of child endangerment sentenced in the preprison period. There are 2 cases of child endangerment and 2 cases of felonious sexual assault sentenced in the postprison period. Thus, sentencing of these offenses is extremely small in both periods. Additionally, the actual behaviors in each of the 5 cases is not as severe as the legal labels would suggest, which is why they are included in a miscellaneous other category. For example, each case of felonious sexual assault involved young women having sexual encounters with teenage males who were close to them in age but too young to give consent. The term 'assault' implies victim coercion, but this behavior was consensual and, thus, comparable to statutory rape. In both cases the victim and his family were friends of the offender. As a result of the circumstances surrounding the cases in these two offense categories, screening and rejection was high. A qualitative assessment of these cases suggested that including them as violent crime belied the nature of the actual behaviors that occurred.

There are 13 cases of miscellaneous other offenses sentenced in the preprison period (see also Table 20). This increases by more than 5 times in the postprison period to 97 offenses. Preprison, 5 out of 13 cases are committed (38.5%), 7 are suspended (53.9%) and 1 receives a non-institutional sentence. Commitments increase by 25.4% in

the postprison period. Thirty-nine out of 97 cases are committed (63.9%). Twenty-one cases are suspended (34.4%), a decrease of 19.5%. In both periods, one case receives a non-institutional sentence, but due to the increased volume of cases sentences, this reflects a 6.1% decrease in this sentencing category.

One of the questions asked in this research is whether there is a decrease in the severity of offenses that are given an incarcerative sentence. The increased sentencing of offenses in this category, combined with increases in commitments suggest a shift toward the incarceration of less serious offenders in the postprison period. The greatest percentage increase in commitments occurs in the general category of Other Offenses.

Commitments by Offense Category. As previously stated, increased use of incarceration has been attributed to an increase in arrests and sentencing for drug offenses. Table 19 reveals an increase in incarcerative sentences for drug sales and drug use, as well as for all other offense categories except violent crime, in the postprison period. However, when commitments are examined in relation to offense categories, changing patterns emerge. In order to examine these more closely, Table 20 presents the percentage and frequency of commitments between periods, by offense categories.

As can be seen, commitments decrease for violent crime, drug offenses, and miscellaneous other in the postprison period. Commitments for theft, welfare fraud, probation and parole violations, and motor vehicle violations increase. Over half of all commitments in the preprison period is for drug offenses (52.9%). Despite expectations that this would increase, particularly given the rise in arrests and sentencing for drug offenses, commitments for drug offenses in relation to other offenses decrease by 9.3% in

Table 20. Frequency and Percentage of Commitments by Offense Category, By Period

Offense Category*	Commitments				
	<u>Preprison Period</u>		<u>Postprison Period</u>		% Difference Between Periods
	(N=29)		(N=139)		
	%	<i>f</i>	%	<i>f</i>	
Violent	6.9	2	1.4	2	-5.5
Drug	51.7	15	42.4	59	-9.3
Trafficking	34.4	10	26.6	37	-7.8
Possession	17.2	5	15.8	22	-1.4
Theft	20.7	6	21.6	30	+0.9
Welfare Fraud	3.6	1	6.5	9	+2.9
Other Property	-	-	2.2	3	-
Probation/Parole Violation	6.9	2	14.4	20	+7.5
Prostitution	-	-	0.7	1	-
Motor Vehicle	3.6	1	5.8	8	+2.2
Escape	-	-	3.6	5	-
Child Endangerment	-	-	0.7	1	-
Miscellaneous Other	6.9	2	1.4	2	-5.5

\*Crimes that comprise each category are listed in Appendix A

the postprison period.

Most of this decline results from a 7.8% decrease in commitments for drug trafficking between periods. In the preprison period, 10 out of 29 commitments (34.4%) are for drug trafficking. This drops to slightly over one-quarter of all commitments (26.6%) in the postprison period, despite an almost four-fold increase in the number of these cases committed. Also, drug possession commitments decrease by 1.4% despite a comparable rise in the volume of cases sentenced between periods. It is notable that the

decrease in commitments for drug trafficking is greater than that for drug possession. This suggests that the processing of drug users is more rigorous in comparison to drug traffickers in the postprison period.

Commitments for theft remain relatively stable between periods, only rising a fraction of a percentage point from 6 out of 29 commitments (20.7%) to 30 out of 139 (21.6%). However, there appears to be a trend toward increased penal severity in sentencing cases involving welfare fraud. Only one case is sentenced to commitment in the preprison period, representing 3.6% of all commitments for that period. In contrast, 9 cases involving welfare fraud are committed in the postprison period. This comprises 6.5% of all commitments for that period, an increase of 2.9% over preprison commitments.

Another noticeable change in commitment practices is found in sentencing for probation and parole violations. Two cases of probation/parole violation are committed in the preprison period, which represents 6.9% of all commitments. Twenty cases involving this offense are committed in the postprison period, representing 14.4% of all commitments, an increase of 7.5%.

One of the most revealing findings in Table 20 is that much of the increase in incarceration in the postprison period is not explained by violent crimes or drugs, which, in relationship to the other offenses, decreases. Instead, much of the rise is caused by the use of commitment for less serious offenses. It is also notable that some of the crime categories that did not result in commitment in the preprison period (e.g., escape, other property, prostitution, and child endangerment), are given committed sentences in the

postprison period. It is also notable that commitments for theft remain fairly stable but increase for welfare fraud. These changes in the frequency of commitment by offense categories offer some degree of support for the concern that an equality ethos may cause the institutional net to widen to include new categories of offenses which did not previously warrant incarceration.

Table 21. Length of Sentence By Period

Length of Sentence	<u>Preprison Period</u>		<u>Postprison Period</u>	
	%	<i>f</i>	%	<i>f</i>
Less than 1 year	11.1	14	16.5	69
1-2 years	9.5	12	13.2	54
2-3 years	1.6	2	2.9	12
3-4 years	-	-	1.0	4
4-5 years	0.8	1	-	-
5 or more years	-	-	0.2	1

Minimum Sentence to be Served. The minimum sentence to be served can be used as an indicator of sentence severity because New Hampshire has a "truth-in-sentencing law" (RSA 651:2(II) (e)) that requires that the minimum sentence be served in full before an offender can become eligible for parole. Therefore, judges should be aware when they sentence an offender that, unlike most other states that only require a portion of the minimum be served in order to become parole-eligible, all New Hampshire prisoners are committed for the full amount of the minimum sentence.

It is generally expected that judges will compensate for this by reducing the minimum sentence to adjust for the effect of this law on actual time served. However, the

State of New Hampshire Prison Expansion Performance Audit Report (1992:27-28) found that this did not occur. As a result, prisoners are incarcerated for approximately 70% longer than they were prior to the enactment of this law.

It is not possible to know, given the limitations of this research, how judges have incorporated this law into their sentencing philosophy and objectives. There are three possible ways in which this statute could be reflected in sentencing. The first, which seems highly unlikely but must be at least considered, is that some judges are unaware that the minimum sentence is being served in full. The second is that this is not a relevant factor in determining the sentence. The third is that it is relevant, and it is the intent of judges that the full minimum be served.

An analysis of sentencing would be strengthened if the ways in which this law was operationally defined by the judges were known. However, the importance of having this information is less relevant to the nature of the questions pursued in this research. Since this statute was passed in May of 1982, its effect on female sentencing, regardless of whatever judicial intention exists regarding the minimum time to be served, should already be reflected in the data. Therefore, it is assumed that the length of sentence provides a reasonable indicator of sentence severity.

Table 21 presents the length of sentences to be served by frequency and percentage of cases for both periods. Sentences are categorized as under one year, one to two years, two to three years, and three to four years, and four to five year, and five years or more. The most common minimum sentenced received for both periods is less than one year. The longest minimum sentence to be served is five years. There is only one such



sentence given, and it is in the postprison period.

As can be seen, the frequency of cases in each category decreases as the amount of minimum time served increases for both periods. However, both the frequency and percentage of cases in each sentence category is consistently higher in the postprison period. This indicates that a greater percentage of offenders were committed for longer sentences in the postprison period.

### Discussion

The data reveal a steady increase in the volume of female felony cases referred for prosecution, and in the volume of cases prosecuted, and sentenced to incarceration over the 7 and one-half year time period studied. Increased criminal processing is particularly evident in the time period following the opening of the women's prison. These findings offer some support for the concern expressed by scholars (Feinman, 1986:26; Daly, 1990:8; Rafter, 1992a:202-203; Chesney-Lind, 1992:32-34) that an equality ethos could result in the increased criminalization of female offenders.

As previously stated, the scope of this study is too limited to provide the rigorous controls that would be necessary to infer a causal relationship between the prison's existence and the criminal processing of female offenders. Other possible explanations for the increased processing and incarceration of female felony offenders that warrant discussion are changes in the nature and extent of female criminal behavior, changes in criminal justice policies and procedures, and statutory changes.

Changes in the Nature of Female Criminality. As presented in Chapter II, although female arrests and incarceration have increased nationally, the nature of female crime has

not significantly changed over the past several decades. Most female crime consists of property offenses, such as shoplifting, welfare fraud, and petty theft. Violent crime is not only far less frequent than non-violent crime but, when committed, it is directed almost exclusively toward family and intimates. As a result, female offenders pose less of a threat and danger to the general society than male offenders whose violent crime is greater and whose victims are more often strangers. Regular drug use by females is, however, rising, and more than half of the women in prison were under the influence of drugs or alcohol at the time of their offense (Snell, 1994).

These offense characteristics are consistent with those processed by the court in this research. It is unlikely that the postprison increase in court referral and prosecution found is the result of changes in female criminality. Court referrals over the entire study period reveal that the distribution of offense categories is relatively stable (Table 14). Furthermore, court referrals for violent crime have decreased. This does not support the "liberation thesis," discussed in Chapter II, which attributed converging crime rates to the emergence of a "new," more violent, female offender (Adler, 1975).

Similarly, court referrals on drug and theft charges are proportionately stable over time. However, welfare fraud is increasing. This is consistent with research that suggests that much of the crime committed by women is motivated by economic need and the feminization of poverty (Steffensmeier, 1980, 1981; Giordano, et.al., 1981; Chapman, 1980; Feinman, 1986; Carlen, 1988).

Additionally, there has been a notable increase over time in the miscellaneous category of "other offenses" (Table 14). This category (see Appendix A for a list of the

specific offenses that comprise each crime category) includes offenses such as motor vehicle violations, gambling, prostitution, criminal mischief, arson, filing false reports, perjury, bailjumping, probation and parole violations, escape, criminal trespass, conspiracy, and witness tampering. Collectively, these offense comprise 13% of all offenses for which females are referred to court for the entire study period. They explain 10.8% of all female felony cases referred in the preprison period and 14.1% of all cases referred after the prison opened. The nature of these offenses, in conjunction with the overall stability in the distribution of offense categories, do not suggest a significant change in the types of offenses for which female offenders are being referred for prosecution.

Rising female arrests and incarceration have also been attributed to increased drug use and more rigorous drug enforcement and sentencing. Nationally, female prisoners are even more likely than male prisoners to use major drugs on a regular basis (Snell, 1994:7), and almost one-third of female inmates in state prisons were committed for drug offenses (Snell, 1994:3). Therefore, it would be reasonable to explain the increased processing of female offenders in New Hampshire by drug offenses. However, the increase in court referrals in the postprison period do not reveal a proportionate increase in drug offenses. In fact, drug offenses are relatively unchanged between periods. Slightly more than one-quarter of all court referrals before and after the prison opened (Table 14) are for drug offenses.

More importantly, when viewed as a percentage of total commitments across all offense categories, commitments for drug offenses decrease by 9.3% between periods

(Table 20). This decrease is particularly evident for drug trafficking, which declines by 7.8%. Although commitments for drug possession also decrease, the difference is not as great as in commitments for trafficking, suggesting a wider net in the use of incarceration for drug offenders. Furthermore, this decrease in commitments does not indicate that increased female incarceration can be explained by stricter sanctions for drug offenses.

Neither is there evidence to suggest that the rise in incarceration is due to increasingly serious or dangerous female criminal behavior. Many of the offenses for which women are committed in the postprison period (e.g., prostitution, welfare fraud, motor vehicle violations, probation/parole violations) are more often dismissed or given a suspended sentence in the preprison period. In fact, the use of incarceration for generalized "other" offenses increases by 25.4% between periods (Table 19). This category explains 17.4% of the offenses for which women are committed in the preprison period and 26.6% of commitment offenses in the postprison period (Table 20).

In general, research has failed to support the existence of a new "liberated" female offender, or that the nature of female crime has significantly changed over the last several decades. Yet female arrest and incarceration have been steadily increasing for over a decade nationwide. Similarly, this research has not found evidence of a change in female criminality, yet female arrest and incarceration in New Hampshire is also dramatically rising. This suggests that a shift in the processing of women in the justice system rather than a change in female criminality may explain the narrowing gender gap in arrests, prosecution, and incarceration, both in New Hampshire and nationwide.

Changes in Law Enforcement and Court Policies. Another explanation for

increased criminalization of female offenders is changes in law enforcement and judicial behavior. Law enforcement policies, such as more stringent drug enforcement in the so-called "war on drugs," has resulted in more offenders being brought into the system (Survey of State Prison Inmates, 1991:4; Inciardi, 1993:29-32). The federal war on drugs has made funding and resources available to local law enforcement agencies for increased drug enforcement (Inciardi, 1993:29-32). This has resulted in higher arrest rates for drug offenders.

In fact, in New Hampshire, from 1982 to 1990, drug-related arrests increased by 27% overall. Drug trafficking arrests rose by 153% and possession increased by 13.2%. The increase in arrests for drugs was felt even more strongly in prison admissions. The largest increase in prisoner's offense behavior was for drug offenses in the 1980's. In 1982, 7.3% of prison admissions was for drug offenses. By 1990 this had increased to 20.5%, an increase of 440.5% (State of New Hampshire Prison Expansion, Performance Audit Report, April, 1992:26).

Increased net-widening at the arrest level will increase the prosecutor's caseload and affect the way cases are processed. Similarly, more effective law enforcement strategies due to better training, increased organizational efficiency, and increased availability of technological resources could result in stronger evidence. Research has shown that prosecutorial discretion is strongly influenced by the strength of evidence, which increases the probability of successful prosecution (Albonetti, 1986). Additionally, changes in public attitudes toward crime and punishment have resulted in more rigorous prosecution and sentencing nationally and in New Hampshire (State of New Hampshire

Prison Expansion Audit, 1992:16-25; Irwin and Austin, 1994:xiii-8).

It is impossible to adequately assess the degree to which changes in law enforcement and court resources and policies are affecting the processing of cases through the courts without more data. There are many reasons for prosecutors not prosecuting or dismissing a case. These reasons include requests by victims or other officials, transferred jurisdiction, negotiated settlements resulting in an informal sanction, failure of defendants to appear for court proceedings, being in violation of statutory time lines for bringing cases forward in compliance with constitutional rights to a speedy trial, the failure of grand juries to indict, and insufficient evidence to insure successful prosecution (Report to the Nation on Crime and Justice, 1988:73; Bureau of Justice Statistics Bulletin, Prosecutors in State Courts, 1992:6). It is not possible to know whether the increase in prosecution found in this research is due to improvements in law enforcement practices which have resulted in stronger evidence and a reduced need to dismiss or nol pros cases, or whether it is due to increased negotiation resulting in more cases prosecuted at reduced charges rather than being dismissed. An examination of the reasons for dismissing cases between periods reveals that more cases were either transferred to another jurisdiction, reduced to misdemeanors, or handled through informal sanctions, such as restitution or voluntary entry into a treatment program, in the postprison period than in the preprison period. This suggests that weaker cases may be being processed in an alternative manner rather than being dismissed.

As discussed in Chapter II, criminal justice decision-making is a complex process. Furthermore, decisions made at one stage in the process can impact subsequent processing

decisions. For this reason, it is not possible to attribute changes in the criminal processing of female felony offenders solely to the existence of the women's prison without proper controls for changes in law enforcement and court policies.

Statutory Changes--The Truth In Sentencing Law. New Hampshire officials have attributed the increase in prison populations to the "war on drugs" and to a statutory change in New Hampshire's sentencing law, the "truth in sentencing law." As discussed, it would seem that were the "war on drugs" a sufficient explanation for the increase in court referrals, this offense category would disproportionately contribute to the rise in referrals and prosecutions. To what extent, therefore, is the increase in court referrals, prosecution, and sentencing explained by the impact of statutory change?

The Truth-in-Sentencing law was enacted in 1982, four years before the preprison study period. The effects of this law would have already been felt by 1986 when this data was gathered, making its influence less relevant to this study. Due to the lack of available statistics on the number of female inmates in the correctional system in 1982, it is impossible to definitively measure the impact of this law. However, female correctional populations appear to have been fairly stable (based on best estimates) until 1985 when they begin to steadily rise. Even the Department of Corrections Biennial Report (1990-1992:55) specifically associates the rise in female inmate populations with the opening of the prison as opposed to the Truth-in-Sentencing law.

None of the explanations discussed thus far seems adequate for explaining the increase in court referrals or in commitments of female offenders. However, there is one last explanation that has not been discussed. It may be that these increases are reflective

of broader national trends of rising arrest and incarceration.

Female prison populations increased by 200% during the decade of the 1980's (Greenfield and Minor-Harper, 1991:1). It may be that the increase in female incarceration in New Hampshire, is merely reflective of a national trend. However, a comparison of prison populations in New Hampshire with those of the New England region, the entire United States and the federal prison system, as presented in Table 22, reveals a disproportionate increase in female incarceration in New Hampshire.

Table 22. State Sentenced Female Correctional Populations by Federal, State, and Regional Jurisdiction, 1985-1991

Jurisdiction								% Change
	1985	1986	1987	1988	1989	1990	1991	1985-1991
New Hampshire	18	22	18	24	38	44	73	+306
Rhode Island	39	46	80	124	205	166	195	+400
Vermont	17	11	14	28	36	36	37	+118
Connecticut	323	395	452	550	647	683	660	+104
Massachusetts	311	326	409	447	498	596	630	+103
Maine	32	27	26	36	46	44	62	+94
United States	20,774	23,822	26,096	29,362	36,177	38,977	41,929	+102
Federal	2,404	2,833	3,027	3,242	4,435	5,257	5,654	+135

Source: Compiled from Correctional Populations in the United States, 1986-1991, U. S. Department of Justice, Washington, D.C.: U. S. Government Printing Office.

As can be seen in Table 22, female incarceration increased by 102% nationwide from 1985 to 1991. However, female incarceration in New Hampshire increased by 306% for the same period. New Hampshire experienced the second largest increase in female prison populations in New England, surpassed only by Rhode Island. The rise in female



incarceration in New Hampshire is disproportionately greater than the increase that is occurring in most of the New England region and nationally. As such, it does not appear to be reflective of an overall trend toward higher imprisonment of women.

As previously stated, New Hampshire has been undergoing a general expansion of its prison system which has drastically increased male prison populations. However, the increased incarceration of women in comparison to that of men is proportionately higher. Table 23 reveals a proportionate increase in the male incarceration rate of .82 in comparison to a proportionate increase of 2.39 in the female incarceration rate.

Table 23. Female and Male Incarceration Rates, New Hampshire, 1985-1991

Prisoner	1985	1986	1987	1988	1989	1990	1991	Proportionate
								Change
								1985-1991
Female	3.8	4.7	3.8	5.1	8.1	9.3	12.9	2.39
Male	14.8	16.9	18.9	22.2	25.1	23.9	26.9	0.82

The differences in the growth of female prisoners in comparison to male prisoners can also be seen by comparing the growth in male prison populations in New Hampshire with the New England region and the United States. This is presented in Table 24. As shown, from 1985 to 1991, male prisoner populations in New Hampshire rose by 119.5%. Although this is double rate of growth that has occurred for men's prison populations nationally (+60.9%), it is still comparatively lower than the three-fold rate of growth that has occurred in New Hampshire's female prison population over that of female prisoners nationally (Table 22).

Table 24. State Sentenced Male Correctional Populations by State and Regional Jurisdiction, 1985-1991

Jurisdiction	1985	1986	1987	1988	1989	1990	1991	% Change 1985- 1991
New Hampshire	665	760	849	995	1,128	1,298	1,460	+119.5
Rhode Island	5,826	6,510	7,059	7,455	8,654	9,817	10,317	+77.1
Vermont	1,285	1,289	1,270	1,241	1,409	1,479	1,517	+18.1
Connecticut	5,079	5,310	5,859	6,310	7,026	7,691	8,525	+67.8
Massachusetts	1,267	1,312	1,348	1,782	2,274	2,226	2,576	+103.3
Maine	660	686	745	792	869	1,013	1,081	+63.8
United States	441,540	476,903	510,688	548,310	617,016	667,966	710,596	+60.9

*Source: Compiled from Correctional Populations in the United States, 1986-1991, U. S. Department of Justice, Washington, D.C.: U. S. Government Printing Office.*

In view of these comparisons, it is unlikely that the increased incarceration of female offenders in New Hampshire can be explained as part of the overall expansion of the prison system in the state or as part of a national trend.

## CHAPTER VI

### SUMMARY AND CONCLUSION

It has been demonstrated in this dissertation that female arrests are rising, but the nature of female criminality has not substantially changed over the past several decades. However, the treatment of female offenders in the justice system is becoming increasingly equal to that of males (see Chapter II). The change toward increased gender equality in the justice process is particularly evident in the rising female incarceration rate. The use of imprisonment as a response to female crime is disproportionately greater than the rise in female arrests for index crimes. Female index crime arrests rose by 10.5% between 1985 and 1991 (Uniform Crime Reports, 1985-1991). However, female prison populations increased by 102%--ten times greater a rate of increase than female index crime arrests--for the same period (Correctional Populations in the United States, 1985-1991).

Additionally, the use of incarceration as a penal sanction is being applied to less serious crimes. As Table 6 reveals, in 1979, almost half (49%) of all female prisoners were incarcerated for violent crimes. Slightly over one-third (37%) of female inmates were incarcerated for property crimes, and 10.5% for drug offenses (Greenfield and Minor-Harper, 1991:2). In 1991, the percentage of women imprisoned for violent crimes dropped by 17%, and property offenders decreased by 8%. Conversely, the percentage of women incarcerated for drug offenses increased to 33%, the same level as violent

offenders (Snell, 1994:3).

Table 25. Offense Profile of Male and Female Prisoners, 1991

Offense Category	Percent of Prison Inmates	
	1991	
	Male	Female
Violent	47.4	32.2
Property	24.6	28.7
Drug	20.7	32.8
Other	7.4	6.3

Source: Tracy L. Snell, "Women in Prison", Bureau of Justice Statistics Special Report. Washington, D.C. U. S. Department of Justice, March, 1994.

It can also be seen in Table 25 that the shift toward the use of imprisonment for less serious offenses is not restricted to females. Rather, there is an overall trend toward using prison for less serious offenders (Irwin and Austin, 1994:33-34). However, the impact of this trend is disproportionately experienced by female offenders since their criminal behavior, in general, is less serious than that of males. Males are still more likely to be incarcerated for violent crimes. In comparison, female inmates are less often incarcerated for violent crime and more often incarcerated for drug and property offenses.

It is also significant to note that the overall rise in prison populations is occurring at the same time that crime rates are declining (Sourcebook, 1992:245; Walker, 1994:4-5). The relationship between imprisonment and crime rates is a source of continuing debate (Wilson, 1975:200-202; Greenwood, 1982; Zedlewski, 1987; Zimring and Hawkins, 1988; Blumstein, 1989; Johnson, 1992; Walker, 1994:77-82; Irwin and Austin, 1994:xiv). However, recent research (Mathiesen, 1990:1-8; Johnson, 1992:199-200; Irwin and Austin, 1994:148) has demonstrated that prison populations and crime rates rise and fall

independently of each other.

If it can be assumed, therefore, that the rise in female prison populations is not a reflection of increased or more serious female crime, what other factors might explain these changes in the use of incarceration? This dissertation has explored several possible alternative explanations for rising female incarceration, all of which are interrelated. One is that criminal justice policies and practices in processing female offenders are changing. Research has shown that as criminal justice agencies become more professional and bureaucratized, discretion is reduced (Report to the Nation on Crime and Justice, 1988:90; Irwin and Austin, 1994:72). Consequently, decision-making is more often based on objective and legalistic criteria and less often on offender characteristics. This results in changing patterns of criminalization and more offenders being formally processed through the justice system (Mathiesen, 1990:9).

A second explanation is that public demands for increased crime control and legislative mandates for more rigorous enforcement, prosecution, and sentencing practices have led to a shift in the philosophy of justice. Rehabilitative goals and objectives, which emphasize individualized justice and, therefore, a reliance on extra-legal factors in processing decisions, are becoming less focal. Instead, an emphasis on objectives of deterrence, incapacitation, and just deserts is becoming more dominant. This is also increasing the volume of offenders processed through the system, creating new patterns of criminalization, and increasing punishment levels. In many jurisdictions, misdemeanor offenses are being escalated in seriousness to felonies, and judicial discretion is being reduced through the enactment of statutory requirements for mandatory sentences,

mandatory minimum sentences, and habitual offender statutes which allow more severe sanctions for certain categories of offender (Report to the Nation on Crime and Justice, 1988:90-91 and 105; Mathiesen, 1990:8-10).

Mathiesen (1990:13) sees the current expansion of the institutional model, as reflected in increased prison construction, and long-term increases in prison populations, as signaling a new stage in penal development. In this stage, an "institutional solution" to the problem of crime is becoming established as the dominant response to crime control. He attributes the motivation of increased imprisonment to a breakdown of public trust in the legitimacy of government and other social institutions. Economic stagnation, high unemployment, and media preoccupation with violence and crime are the conditions underlying this "legitimacy crisis." As confidence decreases in the ability of government and the justice system to provide an effective solution to the problems of crime, there is increased public pressure on politicians to assert control. Borrowing a term from Box and Hale (1982; 1985), he sees legislatures and courts as "anxiety barometers" of public fear of crime and lack of confidence in the justice system.

Support for this observation is found in recent Gallup polls which report that 55% of those surveyed feel there is more crime in their area now than a year ago (Sourcebook, 1992:188-189), and only 17% expressed a great deal of confidence in the criminal justice system or Congress (18%) as institutions. Similarly, public confidence in Congressmen dropped from 18% in 1974 to 12% in 1993 and confidence in Supreme Court Justices dropped from 33% in 1973 to 26% in 1993 (Sourcebook, 1992:164).

In response to public pressure, law-makers and courts have come to define crime

control in terms of a "new and increased need for discipline in given segments and groups in the population" (Mathiesen, 1990:14). The result has been the rapid enactment of federal sentencing policies requiring incarceration and mandatory minimum sentences for certain types of offenses and offenders.

However, these statutory and sentencing changes are disproportionately targeting non-white groups for incarceration (Survey of State Prison Populations, 1991:3; Irwin and Austin, 1994:4-5; Walker, 1994:94). Additionally, prison populations are increasingly reflecting the most marginal members of American society in terms of education, employment, work-skills, and addiction to drugs or alcohol (Survey of State Prison Inmates, 1991:3; Irwin and Austin, 1994:4-5).

Mathiesen's analysis does not specifically identify women as one of the segments being perceived by legislators and judges as requiring more "discipline" and control. However, the changing social and economic roles of women discussed in Chapter II, suggest that this paradigm may help to understand the changing, and increasingly more equitable, treatment of women in the justice system.

A third explanation, and that which has been the focus of this research, is the unintended consequences of increased sensitivity toward and awareness of gender equity issues in law, the justice system, and the broader society. The combined effect of these factors--changing patterns of criminalization, increased demands for punishment of offenders, and increased demands for gender equality--has been a diminishing gender gap in arrests, prosecution, and incarceration. There is no single causal explanation for rising female incarceration. However, when an emergent equality ethos is considered in relation

to broader patterns of increased criminalization and punishment, the disproportionate rise in female incarceration becomes more understandable.

Female prison populations have always been, and continue to be, smaller than male prison populations. Consequently, the facilities, services, and programs available to female prisoners are fewer in number and of lesser quality than those available to male prisoners. Since most states only provide one women's prison, female correctional populations are more heterogeneous and classification systems are less effective in assigning inmates to an appropriate treatment setting. Women tend to be held at higher security levels than their behavior warrants which further restricts access to treatment.

As female prison populations rise, these characteristics and the problems that have historically characterized women's prisons become more pronounced (see Chapter III). Additionally, rising female correctional populations increase awareness of gender disparities in corrections and demands for correctional reform. Unlike male prisoners who have used both riots and court litigation to protest confinement conditions, women prisoners have not engaged in activist behavior until recently. However, women prisoners are increasingly seeking relief of their correctional problems through the courts, and the legal basis for prisoner litigation varies by gender. Whereas male inmates tend to challenge confinement conditions on the basis of 8th amendment protections against cruel and unusual punishment, female inmates more often utilize the Equal Protection Clause.

There are several possible reasons for this. First, the physical conditions of women's prisons tend to be less physically restrictive and more comfortable than those of men's prisons. As a result, an 8th amendment challenge may be a less effective legal



strategy for female inmates. Second, the increased sensitivity displayed by the courts toward discrimination cases, and the adoption of a more rigorous standard of intermediate scrutiny in reviewing such cases may make an Equal Protection Challenge more effective. Third, legal scholars, reformers and advocates for women's rights have become wary of the long-term social consequences of legal strategies based on demands for the special needs of women. Increasingly, legal equity is being sought as the solution for social inequality (Smart, 1989; Binion, 1990; Carlen, 1990; Daly, 1990; Rhode, 1991; Villmoare, 1991).

Whatever the motivation, the relief that demands for equal treatment has provided for incarcerated women has been shown to have a razor's edge. On the one hand, it has been an effective strategy for improving the conditions, services, programs and facilities for women prisoners. However, legal reform, as developed overtime through caselaw, has come to rely on a standard of parity that requires women's prisons to be 'substantially equivalent' to those of men. This standard was established in Glover v. Johnson, and the court's ruling was explicit in differentiating between parity and identity in correctional programming:

The women inmates have a right to a range and quality of programming substantially equivalent to that offered the men...But additions to that program should be based on the interests and needs of the female inmates rather than short-sighted efforts to duplicate the programs offered at male institutions. While, in many cases, equal treatment may be safely achieved by requiring identical treatment, I do not believe that in this case, identical treatment is either wise or just.

Theoretically, therefore, a parity standard should allow correctional administrators to develop programs and policies for male and female prisoners that are equivalent while

still acknowledging valid gender differences. In some cases this has occurred, for example, some courts have not only ordered women's prisons to provide inmates with access to a law library but also with access to training in its use (Rafter, 1991:38-39). This additional provision has come out of a recognition that women prisoners have less of a history of 'jailhouse lawyering' and, hence, role models for effectively utilizing legal resources than do male prisoners. As a result, providing women's prisons with a law library is ineffective unless they are also provided with the ability to use it.

However, as shown in this dissertation, the practical application of a parity standards has, for the most part, provided only partial relief to incarcerated women. Parity has not been sufficiently defined by the courts to insure that its intent is realized in practice. For some correctional administrators, parity is defined as "sameness" (see Chapter IV). Treating women equally with men--treating them the same--has resulted in valid gender differences in correctional needs being ignored and neglected. Consequently, the standard for developing correctional programs for women has too often become that which is available for men, regardless of its appropriateness for women.

At a broader, systemic level, an additional unintended consequence of parity and equal treatment demands has been increased criminal processing and an expansion of the institutional model to more fully include women. Legal reform of women's prisons focuses attention on building better prisons (Rafter, 1992a:202) rather than encouraging a critical examination of the efficacy and desirability of incarceration as a response to female crime.

This research has examined the use of legal reform to create a women's prison and

the practical application of a parity standard as the basis for developing correctional programs and services for female inmates. It has done so through a case study of the creation of the New Hampshire State Prison for Women. The women's prison was created to meet the correctional needs of women prisoners and to solve the problem of gender discrimination in corrections. Yet, the women inmates remain dissatisfied with the quality and availability of correctional services, facilities and programs that are provided for them. The standard of parity has given them correctional conditions that are substantially equivalent to those of male prisoners. However, interviews with female inmates reveal that they still view their conditions as inadequate and inferior to those provided to males (Franklin Pierce Law Center, 1993:53). Furthermore, as shown in Chapter V, the existence of the prison makes incarceration a more viable sentencing alternative to judges. As a result, the female correctional population in New Hampshire is rising at nearly three times the rate of increase of female prison populations nationally and at over twice the rate of the male prison population in-state.

#### Implications of Increased Female Incarceration

The implications of increased female incarceration include: the impact on the children of inmate mothers; rising correctional costs and the cost-effectiveness of incarcerating women; and, the effect of incarceration on further criminality. Each of these is briefly addressed in the section that follows.

Effect on Children. Women prisoners are more likely to be mothers, more likely to have lived with their children prior to incarceration, and more likely to return to their children as custodial parents following release than are men prisoners (Greenfield and

Minor-Harper, 1991). Additionally, concern over children is a greater problem for female inmates (see Chapter III). This is particularly true because the children of inmate mothers rarely remain with their fathers and are more likely to be placed under institutional or foster care than are the children of male inmates, who often remain with their mothers.

It has been observed that when judges sentence a woman they sentence a family (McGowan and Blumstein, 1981; Daly, 1989). Empirical research on the long-term effects of maternal incarceration on children is not available and needs to be conducted. Of particular interest is the question of its specific impact on the future criminality of the children. However, some insights regarding this issue may be gleaned from a retrospective look at the family background of current inmates. A recent survey (Snell, 1994:5) reveals that women prisoners (43.6%) are slightly more likely than male prisoners (36.9%) to have come from a home in which a family member was incarcerated. Of those prisoners who were raised in such a home, women were also slightly more likely to have had their mothers be incarcerated (4%) than men (1.5%). This suggests that maternal incarceration may have a greater effect on the criminal behavior of daughters in comparison to sons. If this is true, increased female incarceration may be establishing the conditions for a cycle of further and increased criminality, particularly of girls and women.

Increased Criminality of Women. The question of whether prison rehabilitates offenders has been a source of extensive debate in the literature (Palmer, 1983; Walker, 1994:209-210). However, a number of research studies have challenged the effectiveness of imprisonment as a means of reducing further criminality of offenders (Bailey, 1966; Hood, 1967; Martinson, 1974; Petersilia, et.al., 1987; Perkins, 1994). The nature of

female crime and criminality, makes the question of how imprisonment influences further criminality particularly salient.

The majority of female prisoners have been incarcerated for property and drug offenses. Female criminality has been strongly linked to economic need, drug and alcohol abuse, and a history of physical and sexual abuse that has contributed to poor self-esteem and high dependency on others (Forum on Issues in Corrections, 1991:2-9).

Women's prisons have been described as physically less restrictive than men's prisons but psychologically more controlling and infantilizing. By fostering dependency and failing to develop programs that build self-esteem, prison environments serve to perpetuate rather than control further criminality. In 1986, 31.1% of women in prison had not had any prior sentences to incarceration or probation (Greenfield and Minor-Harper, 1991:3), by 1991 this had decreased to 28.9% (Snell, 1994:4).

The profile of female offenders is similar to that of males yet different in three critical ways. First, women's crimes are less dangerous and threatening to society. Second, women are more likely to occupy a criminal role of accessory or accomplice, particularly for serious crimes, than sole perpetrators (Ward, Jackson, and Ward, 1980). This criminal behavior reflects traditional female social roles more than it does the existence of autonomous and "liberated" offenders predicted in earlier theories. Third, as a result of the nature of their criminal offenses and gender differences in willingness to change destructive behavior patterns, women prisoners are more receptive to treatment than are men prisoners (Forum on Issues in Corrections, 1991:2).

These qualities, combined with the small population of female inmates, make

women offenders ideal candidates for community alternatives and diversion. When the potential impact for future criminality on the children of inmate mothers is considered, the appropriateness of alternative forms of penal sanction become even more apparent.

Cost-Effectiveness of Incarcerating Women. In addition to the issues discussed, there is the further question of whether society can financially afford to continue expanding the institutional model. Incarcerating non-violent offenders whose criminality is rooted in more fundamental social and economic problems is a costly solution to crime. Irwin and Austin (1994:11) have commented on the counterproductive nature of prison expansion:

Our society faces an enormous public policy dilemma. On one hand we are expending a greater portion of our public dollars on incarcerating, punishing, treating, and controlling persons who are primarily from the lower economic classes in an effort to reduce crime. On the other hand, we have set in motion economic policies that serve to widen the gap between the rich and the poor, producing yet another generation of impoverished youths who will probably end up under the control of the correctional system. By escalating the size of the correctional system we are also increasing the tax burden and diverting billions of dollars from those very public services (education, health, transportation, and economic development) that would reduce poverty, unemployment, crime, drug abuse, and mental illness.

Correctional spending is rising faster than spending on any other component of the justice system. Between 1979 and 1990, direct expenditures for corrections increased by 313% bringing national spending on corrections up to nearly \$25 billion annually (Sourcebook, 1992:2-3). While correctional costs rise, state spending on education, transportation, and welfare are declining (Irwin and Austin, 1994:17).

However, increased arrest, prosecution, and mandatory and longer sentences mean

that more prisons need to be built. Prison construction is costly--estimates range from \$7,000 per bed in a minimum security facility to \$155,000 in a maximum security prison (Irwin and Austin, 1994:145). However, since construction costs usually must be financed through municipal bonds or other types of financing, the cost can be as high as \$268,000 per bed. Irwin and Austin (1994:145) have estimated that a prison, financed over 30 years, will cost taxpayers more than \$1 million per prisoner.

Construction costs are only one consideration. The cost of building new prisons is only 5-7% of the total costs involved in expanding the institutional model. Approximately 15 to 20 times that cost must be budgeted over the life of each prison built in order to operate it (Forum on Issues in Corrections, Briefing Materials, 1991:3).

The operating costs of New Hampshire's correctional system was \$10 million in 1982 (Department of Corrections Biennial Report, 1980-1982). After a decade of institutional expansion, and \$200 million spent on capital improvements, the annual operating costs of the correctional system in 1991 is \$39.6 million (State of New Hampshire Expansion Performance Audit, 1991; Boston Globe, July 11, 1993). Furthermore, the need for more institutional space and the costs for additional capital improvements do not appear to be stopping.

Currently, the New Hampshire legislature has initiated a 10-year projection study of correctional facility and program needs. While the study acknowledges the need to more clearly differentiate among correctional populations and increase diversion and the use of intermediate sanctions with low-risk offenders, it also recommends increasing institutional capacity and further capital expenditures for facilities. Through contracting

with the counties, renovating existing property, and purchasing new sites, it recommends adding between 900 and 1200 beds over the next 10 years. Part of this recommendation includes appropriating \$7 million to purchase a new, larger facility to replace the existing women's prison (Prisoner Population Management Study, Interim Briefing, June 14, 1994). This facility will house 130 women, and provide the room needed to develop treatment programs. While the goal of expanding treatment is commendable, it is difficult for legislators to understand that the availability of more space will translate into more inmates to fill the space (Meeting with Legislative Subcommittee on Crime and Corrections, June 22, 1994). Treatment will always be a secondary objective that is easily abandoned when budgetary allocations or space is limited. It is the nature of penal institutions to prioritize security.

The focus on providing more space and more programs for women, obscures the question of the objective and purpose of the prison. If it is to incapacitate and punish, then institutional expansion is a humane solution to the need for more space. If it is to provide treatment and to rehabilitate, then the rational basis for expanding the prison is called into question.

Correctional administrators and researchers alike have acknowledged that building high security prisons is not cost effective for female offenders. Both have called for greater use of electronic monitoring and non-institutional alternatives to incarceration (Forum on Issues in Corrections, 1991:6-9).

### Conclusion

It has been shown in this dissertation that the nature of female criminality, and the



personal characteristics of female prisoners make women inmates ideal candidates for alternative sanctions. However, the focus on building prisons and the use of legal reform for establishing standards for how those prisons will operate diverts funding and creative energy away from developing alternatives to penal institutions.

This dissertation and other research (Singer, 1979:336-340; Chapman, 1980; Carlen, 1983, 1988; Smart, 1989; Daly, 1990; Rafter, 1991, 1992a, 1992b; Chesney-Lind, 1992) have questioned whether legal reform of prisons and legal remedies for addressing the deficiencies of the institutional model provide the most appropriate solutions to the problems of female crime. Rafter (1992a) has called for the development of a new model that goes beyond parity and beyond court reform.

Singer (1979:340-341) has observed that "[E]fforts to protect the legal rights of women who are in prison must be coupled with efforts to develop alternatives to the present system...It would be tragically short-sighted if legal efforts on behalf of women in the criminal justice system were restricted to demands for equal protection with men." She calls for greater use of diversion and "the development of services for the poor, who are processed through the criminal justice system instead of being afforded medical, education, legal, and vocational services in the community."

Similarly, Carlen (1990:120-121) has called for an academic and policy agenda that moves beyond the debate between equality and special needs and seeks instead to address the realities of women's crime and penal treatment within the broader context of economic, political, structural, and ideological factors related to crime and punishment. She calls for a increased concern for social justice not just legal justice that seeks to

remediate the "wrongs of women in the criminal justice and penal systems."

If a new model is to emerge, there is a need for more research on the impact of an equality ethos on female criminality, of the long-term consequences of increased incarceration of female offenders on their and their children's criminality, and on the effectiveness of alternative sanctions. Often penal institutions are used because of a lack of viable alternatives.

In addition to the need for more sentencing alternatives, there is also a need for increased education of legislators, judges and other justice personnel regarding alternative responses to criminal behavior. The ability of judges to individualize sentencing is hindered when resources are limited and prison is seen as the only option. Related to this is the need to rethink the issue of judicial discretion. Uniform sentencing codes have developed in response to the problems of sentence disparity associated with individualized sentencing. However, it has been suggested that the solution of limiting judicial discretion may be worse than the problem of sentence disparity (Walker, 1994:93). More research on ways to minimize disparities in sentencing while maintaining the idealized principles embodied in individualized justice is needed to resolve this dilemma.

There is also a need for greater clarity in defining and applying the concept of parity in corrections. Increased judicial and administrative awareness that parity can be used to develop correctional programs that acknowledge valid gender differences rather than strive for "sameness" is called for. As Singer (1979:340-341) observed, it is important to preserve the legal rights of all inmates. For parity to be effective, it must be more clearly defined and applied with the objective of meeting the correctional needs of

male and female inmates. Part of this objective is an understanding that the benchmark for parity should be the highest standards of care and treatment, not the lowest that will be minimally accepted by the courts.

Ultimately, for meaningful correctional reform to occur, society must be willing to seek just and humane solutions to social problems. Criminal justice policies often reflect a continual and counterproductive cycle of incarceration and decarceration strategies. The need is to go beyond legal reform and parity and develop a new model based on broader principles of social justice. This means developing a new consciousness and awareness of basic human rights that are afforded to all members of the society, regardless of age, gender, race, ethnicity, religion, physical or mental ability, productivity, or behavior. The philosophical and ethical foundations for developing crime control policies must originate from a belief in the inherent dignity of the human being that is independent of individual action. Indiscriminate use of prisons based on objectives of incapacitation, just deserts, or even rehabilitation will not solve our crime problems.

Similarly, increased criminal processing of female offenders and reliance on legal reform to correct gender inequities in prisons will only serve to contribute to the rationale that more prisons are needed. While this is a questionable assumption in general, it is particularly questionable when applied to female criminality. Effective and appropriate reform must challenge the overuse of prisons. An institutional solution to crime is incapable of adequately meeting the correctional needs of female offenders.

In conclusion, there also needs to be a recognition that any policies which are restricted in scope to merely reforming the justice process will have limited effectiveness.

Just as there is a need to look beyond parity as a solution to women's correctional problems, there is a need to look beyond the justice system as the solution to the problems of crime, disorder, and social disorganization. Crime is the symptom, it is not the problem. Policy questions must encompass ways to improve the general quality of social life, encourage social cohesiveness, strengthen core institutions like families, neighborhoods, and communities, and strive for greater economic justice. Social policies and justice policies are intertwined. To focus crime prevention and crime control efforts only on changing the justice system is short-sighted and destined for failure.

Several decades of criminological research have provided the necessary information for understanding the causes of crime and the steps necessary for its control. Solutions that call for reforming the justice system are quick and easy. They are also attractive to politicians because it is easier to mobilizing public support against a common enemy--crime--than it is to mobilize support for social justice initiatives. However, like any other "quick fix" remedy, they will fail over time unless they are combined with more comprehensive and long-term changes in society.

APPENDIX A

OFFENSE CATEGORIES

VIOLENT

Negligent Homicide/Motor Vehicle Fatality  
Attempted Murder  
Aggravated Assault  
    Assault  
    Armed Robbery  
    Robbery

DRUG TRAFFICKING

Sale of Narcotic or Controlled Drug  
Dispensing of Narcotic or Controlled Drug  
Manufacturing of Narcotic or Controlled Drug  
Transporting/Delivery of Narcotic or Controlled Drug  
Possession with Intent to Sell Narcotic or Controlled Drug  
Facilitating Sale of Narcotic or Controlled Drug

DRUG POSSESSION

Possession of Narcotic or Controlled Drug  
Possession of Drug Paraphernalia  
Knowingly in Presence of Narcotic or Controlled Drug

PROPERTY

Theft/Theft by Deception/Theft by Misappropriation/Theft by Unauthorized  
    Taking  
Welfare Fraud  
Embezzlement  
Forgery  
Burglary  
Issuing Bad Checks  
Shoplifting

APPENDIX A

OTHER PROPERTY

- Receiving Stolen Property
- Arson
- Criminal Mischief
- Unauthorized Use of a Motor Vehicle

OTHER

- Motor Vehicle (includes habitual offender, driving under intoxication, leaving the scene of an accident, conduct after an accident, operating without a valid license)
- Child Endangerment/Abuse
- Felonious Sexual Assault
- Escape
- Probation/Parole Violation
- Prostitution

MISCELLANEOUS OTHER

- Weapons violations
- Perjury
- Witness Tampering
- False Information/Filing False Report/Unsworn Falsification
- Gambling
- Resisting Arrest
- Criminal Restraint
- Fugitive
- Attempted Suicide
- Disorderly Conduct
- Interference with Custody
- Willful Concealment

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